IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

EDWARD A. KUBISTY,

Plaintiff,

v.

HERITAGE INSURANCE GROUP, INC., et al.,

Defendants.

Case No. 94-C-555-BK

DISMISSAL WITH PREJUDICE

Plaintiff, Edward A. Kubisty ("Plaintiff"), pursuant to Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure, hereby dismisses the above captioned cause with prejudice as to any and all of the Plaintiff's claims made therein.

Edward A. Kubisty
Attorney Pro Se
13906 Wimbledon Loop
Little Rock, AR 72209

CERTIFICATE OF MAILING

I hereby certify that on the 24th day of August, 1994, a true and correct copy of the above and foregoing document was mailed by first class mail, postage prepaid, to:

Gary H. Baker
Victor E. Morgan
BAKER & HOSTER
800 Kennedy Building
Tulsa, Oklahoma 74103

Edward A. Kubisty

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

Kimberly Vanderboegh,

Plaintiff,

-vs-

Paradise Bakeries of Tuulsa, Inc., Robert Curnutt, Tisa Larson, and Jimmy Moore,

Defendants.

Case No. 94-C-47-K

STIPULATION OF DISMISSAL WITH PREJUDICE

The parties hereby stipulate that this case be dismissed with prejudice. Each party will bear his/her own attorneys' fees and costs.

J. Daniel Morgan

J. Daniel Morgan
Gable & Gotwals
Suite 2000
15 West 6th Street
Tulsa, Oklahoma 74119
(918) 582-9201

Attorney for Defendants

Andrew Nestor III OBA 12800
One Summit Plaza
Suite 510
5727 South Lewis
Tulsa, OK 74105

Attorney for Plaintiff

55665

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

MITCHELL TROTTER, III,

Plaintiff and
Cross-Defendant,

vs.

COMMUNITY BANK & TRUST CO.,

Defendant, Cross-Plaintiff
and Third-Party Plaintiff,

UNITED STATES OF AMERICA,
ex rel., COMMISSIONER OF
INTERNAL REVENUE SERVICE;
STATE OF OKLAHOMA, ex rel.,
OKLAHOMA TAX COMMISSION and
EUNA TROTTER PERKINS,

Third-Party Defendants.

Case No. 93-C-482-BU

ORDER

This matter comes before the Court upon the Joint Application for Judgment (Docket No. 30), wherein Plaintiff, Mitchell Trotter, III, Defendant, Community Bank & Trust Company, and Third-Party Defendant, Euna Trotter Perkins, request this Court to grant Defendant, Community Bank & Trust Company's Motion for Summary Judgment (Docket No. 14) as to Third-Party Defendant, Oklahoma Tax Commission. Third-Party Defendant, Oklahoma Tax Commission, has not responded to the joint application within the time prescribed by Local Rule 7.1. Upon due consideration of the joint application, the Court finds that the joint application should be granted and is hereby GRANTED. Having reviewed Defendant, Community Bank & Trust Company's summary judgment motion, the Court finds that no genuine issues of material fact exists and that

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Defendant Community Bank & Trust Company is entitled to judgment against Third-Party Defendant, Oklahoma Tax Commission, as a matter of law.

Entered this 30th day of August, 1994.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

LINDSEY K. SPRINGER, ET AL.,

Plaintiffs,

vs.

COLLECTOR of INTERNAL REVENUE, ET AL., John Does 1-10,

Defendants.

Case No. 94-C-350-BU

ORDER

This matter comes before the Court upon the Motion to Withdraw as Plaintiffs filed by Plaintiffs, Ronald J. Jackson and Virginia L. Jackson, on August 29, 1994. Upon due consideration, the Court finds that the motion should be and is hereby GRANTED. The complaint of Plaintiffs, Ronald J. Jackson and Virginia L. Jackson, against Defendants is hereby DISMISSED.

Entered this 29th day of August, 1994.

MICHAEL BURRAGE
U.S. DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

JOHN A. COATES & MARY E. COATES,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

CIVIL NO. 93-C1119-B

STIPULATION FOR DISMISSAL

It is hereby stipulated and agreed that the complaint in the above-entitled case be dismissed with prejudice, the parties to bear their respective costs, including any possible attorneys fees or other expenses of litigation.

KENNETH R. MOURTON
Ball & Mourton, Ltd.
E.J. Ball Plaza, Suite 700
112 West Center, P.O. Box 1948
Fayetteville, AR 72702-1948
Telephone No.: 501-442-6213

Attorney for Plaintiffs

CHRISTOPHER H. GRIGORIAN
Department of Justice
Tax Division
Ben Franklin Station
Post Office Box 7238
Washington, D.C. 20044
Telephone No.: 202-514-6520

Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

NITA MONNINGER,

Plaintiff,

vs.

ELECTRO ENTERPRISES, INC., an Oklahoma corporation, BUD ENRIGHT, an individual, and CALVIN ENRIGHT, an individual,

Defendants.

Case No. 94-C-610-B

ORDER

Before the Court for consideration is a Motion to Dismiss (Docket #6) pursuant to 12 O.S. § 2012(B)(5) and (6), filed by Defendants Electro Enterprises, Inc. ("Electro"), and Bud Enright.

Defendants Electro and Bud Enright removed to this Court, alleging federal question jurisdiction pursuant to 28 U.S.C. 1446(a). Defendants stated that Plaintiff predicated her claims on allegations of sexual harassment, which cannot be adjudicated without application and interpretation of federal Title VII laws. There is no diversity of citizenship.

The Court believes, however, that it does not have jurisdiction in this matter. Under 28 U.S.C. § 1447(c), "if at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." Lack of subject matter jurisdiction may be asserted by the Court sua sponte, at any time. Jeter v. Jim Walter Homes, Inc., 414 F.Supp. 791 (W.D.Okla. 1976). The existence of federal question

jurisdiction is governed by the "well-pleaded complaint" rule. "Whether a case is one arising under [federal law] ... must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration...." Oklahoma Tax Commission v. Graham, 489 U.S. 838, 840-1, 109 S.Ct. 1519, 1521, 103 L.Ed.2d 924 (1989). A case is not properly removed to federal court unless it might have been brought there originally. Id., *see also* Fajen v. Foundation Reserve Insurance Co., Inc., 683 F.2d 331 (10th Cir. 1982).

Defendants assert that this case cannot be adjudicated without resorting to construction of federal Title VII laws. However, the Court disagrees. Plaintiff's causes of action are in breach of contract, fraudulent inducement to contract, intentional infliction of emotional distress and loss of reputation, which are all claims under Oklahoma law, not federal law. While Plaintiff does allege that Defendants failed to control the business "to ensure that the work place was free from a hostile environment" (Amended Petition, ¶ 16), there is no Title VII claim in the Amended Petition.

In addition, Plaintiff does not allege that she was fired due to discrimination prohibited by Title VII or by any other federal antidiscrimination statutes. Instead, Plaintiff states in her Amended Petition that she was terminated "due to Defendant's illegal activities" which allegedly caused airline businesses to cease doing business with Electro (Amended Complaint, ¶ 21(c)). Being fired due to a lack of business for the employer is not actionable under federal law, whatever the reason for the lack of

work. Even Plaintiff's statement of subject matter jurisdiction (Amended Complaint, ¶ 8) mentions no federal question issue.

Therefore, the Court finds that it has no subject matter jurisdiction. This case is hereby REMANDED to the District Court for Tulsa County, State of Oklahoma.

IT IS SO ORDERED this 30th day of August, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARION PARKER,

Plaintiff,

v.

BANCOKLAHOMA MORTGAGE COMPANY, HARRY MORTGAGE COMPANY, BRUMBAUGH & FULTON COMPANY, COMMONWEALTH MORTGAGE COMPANY, FIRST MORTGAGE COMPANY, NORWEST MORTGAGE COMPANY; BOATMEN'S BANK, MORTGAGE CLEARING CORPORATION, and DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Defendants.

No. 92-C-664-B

O R D E R

The motion to enter case as Plaintiff of Russell McIntosh (Docket #118) is before the Court for decision.[1] It is apparent from the pleadings and the record before the Court that while there may be common issues of law in the Marion Parker and Russell McIntosh claims, said claims factually arise from separate transactions and occurrences or series of transactions and occurrences. Intervenor applicant, Russell McIntosh, makes no specific failure to hire claim against the Defendants, Bank United of Texas or Woodland Bank. Karamous v. Baker, 617 F.Supp. 809

[1]The previous order of this Court sustained the motion to dismiss of the various defendants. However, the Court's order in that regard was reversed by the Tenth Circuit Court of Appeals and Plaintiff Marion Parker's racial discrimination claim under 42 U.S.C. § 1981 remains viable herein. This Court's prior dismissal of Plaintiff Parker's alleged conspiracy claim and Oklahoma public policy Burk tort claim was affirmed by the Tenth Circuit Court of Appeals opinion herein.

(D.C.Mich. 1985). Because the claim of applicant intervenor, Russell McIntosh, does not arise from the same transaction or occurrence or series of transactions and occurrences, the motion to enter case as plaintiff of Russell McIntosh is hereby denied. Fed.R.Civ.P. 20(a) and 24, and Slump v. Balka, 574 F.2d 1341 (10th Cir. 1978). If Russell McIntosh chooses to proceed with his complaint, it must be by separate case filing. For the above stated reasons, Plaintiff Russell McIntosh's complaint filed herein March 3, 1993, is hereby stricken without prejudice to the refiling of same.[2]

IT IS SO ORDERED this 30th day of August, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

[2]This order renders moot the motion of Bank United of Texas to strike McIntosh as a plaintiff (Docket #115).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KAREN SIMPSON, on behalf of Plaintiff, ADRIEL C. L. SIMPSON,

Plaintiff,

vs.

DORA VASHER, et al.,

Defendants.

No. 92-C-776-B

ORDER

The Court has for consideration the Report and Recommendation (the "Report") of the U.S. Magistrate Judge filed on July 27, 1994, in this prisoner's civil rights action pursuant to 42 U.S.C. § 1983. The Magistrate Judge recommends that Defendant Hanna's motion to dismiss be granted as to Plaintiff's First and Eighth Amendment claims and to his Fourteenth Amendment claims which allege (1) unfair treatment, (2) verbal and emotional abuse, (3) Defendant made fun of him, and (3) being served cold meals. As to the remaining claims, the Magistrate Judge recommends that Defendant Hanna's motion for summary judgment be granted. On August 8, 1994, Plaintiff filed his objection. Defendant Hanna filed his response and Plaintiff has filed an additional objection.

In accordance with Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1)(C), the Court has reviewed de novo those portions of the Report to which the Respondents have objected, and has concluded that the Report should be adopted and

affirmed. IT IS THEREFORE ORDERED:

(1) That the Report and Recommendation of the Magistrate Judge (doc. #26) is adopted and affirmed;

(2) That Defendant Hanna's motion to dismiss (doc. #10-1) is granted as to Plaintiff's First and Eighth Amendment claims and to his Fourteenth Amendment claims which allege (1) unfair treatment, (2) verbal and emotional abuse, (3) Defendant made fun of him, and (3) being served cold meals; and

(3) That Defendant Hanna's motion for summary judgment (doc. #10-2) is granted as to Plaintiff's remaining claims.

SO ORDERED THIS 30th day of Aug, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KAREN SIMPSON, on behalf of Plaintiff, ADRIEL C. L. SIMPSON,

Plaintiff,

vs.

DORA VASHER, et al.,

Defendants.

No. 92-C-776-B

ORDER

Defendants Dora Vasher and Carol Pendleton (originally sued as Carl Smith, see January 19, 1993 order, doc. #12) are hereby dismissed without prejudice for lack of service. See Fed. R. Civ. P. 4(m) (effective December 1, 1993). Any objections to this order should be filed within ten (10) days from the filing of this order.

SO ORDERED THIS 30 day of Aug, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KAREN SIMPSON, on behalf of Plaintiff, ADRIEL C. L. SIMPSON,

Plaintiff,

vs.

DORA VASHER, et al.,

Defendants.

No. 92-C-776-B

JUDGMENT

In accord with the Order granting in part Defendant Hanna's motion for summary judgment, the Court hereby enters judgment in favor of Defendant Lamonte Hanna, sued as supervisor of the Tulsa County Juvenile Detention Center during the events at issue, and against Plaintiff, Adriel C. L. Simpson. Plaintiff shall take nothing on his claim. Each side is to pay its respective attorney fees.

SO ORDERED THIS 30 day of Aug, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LINDA K. DEUTSER,

Plaintiff,

vs.

THE UNITED STATES JUNIOR CHAMBER OF COMMERCE, a Missouri corporation,

Defendant.

Case No. 94-C 726E

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

It is hereby stipulated by Nancy J. Siegel, Richards, Paul, Richards & Siegel, attorneys for Plaintiff, and Carl D. Hall, Jr., Nichols, Wolfe, Stamper, Nally & Fallis, attorneys for Defendant, that Plaintiff's Complaint against Defendant is dismissed with prejudice and that each side agrees to pay their own attorney's fees and costs associated with this matter.

Nancy J. Siegel
Richards, Paul, Richards & Siegel
9 East Fourth Street, Suite 400
Tulsa, Oklahoma 74103-5118
(918)

ATTORNEYS FOR PLAINTIFF
LINDA K. DEUTSER

Carl D. Hall, Jr., OBA # 3716
NICHOLS, WOLFE, STAMPER,
NALLY & FALLIS, INC.
400 Old City Hall Building
124 East 4th Street
Tulsa, OK 74103-5010
(918)584-5182

ATTORNEYS FOR DEFENDANT,
THE UNITED STATES JUNIOR
CHAMBER OF COMMERCE

CERTIFICATE OF SERVICE

I hereby certify that on the 30 day of August, 1994, a true and correct copy of the above and foregoing was deposited in the United States mail, postage prepaid and properly addressed to:

Nancy J. Siegel
Richard L. Blanchard
Richards, Paul, Richards & Siegel
9 East Fourth Street, Suite 400
Tulsa, Oklahoma 74103-5118

Carl D. Hall, Jr.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
AUG 30 1994
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

Equal Employment Opportunity Commission,	)	
Plaintiff,	)	
vs.	)	No. 93-C-828 E
Woodcraft Furniture,	)	
Defendant.	)	

JUDGMENT

This action came on for consideration before the Court, Honorable James O. Ellison, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered in favor of the Defendant,

IT IS THEREFORE ORDERED that the Plaintiff take nothing from the Defendant and that the action be dismissed on the merits.

ORDERED this 29th day of August, 1994.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET
DATE 8-30-94

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GWENDOLYN PARTNEY,

Plaintiff,

vs.

SAINT FRANCIS HOSPITAL, INC., an Oklahoma Corporation,

Defendant.

No. 92-C-335-K

JUDGMENT

This matter came before the Court for consideration of the parties' motions for summary judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed on April 5, 1994, and the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the defendant and against the plaintiff.

ORDERED this 29 day of August, 1994.

Terry C. Kern

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GWENDOLYN G. PARTNEY,

Plaintiff,

vs.

SAINT FRANCIS HOSPITAL, INC., an Oklahoma corporation,

Defendant.

NO. 92-C-335-K

O R D E R

NOW before this Court for consideration is Defendant, Saint Francis Hospital, Inc.'s, (SFH), Motion To Reconsider in Light of New 10th Circuit Standard Regarding Retaliation (Docket #90), and Plaintiff, Gwendolyn G. Partney's, Motion To Reconsider the Granting of Partial Summary Judgment to Defendant (Docket #95). After careful and detailed review of the record, the parties' arguments, and the applicable legal authorities cited, the Court concludes the Defendant's motion should be GRANTED, and the Plaintiff's motion DENIED.

Background of Litigation

In the Amended Complaint, Plaintiff, age 46, alleged:

1. Her sex and age were considered a negative and determining factor in the April and August 1990 "promotions" given to Ray Weaver, a male under 40. The positions were not posted as required by hospital policy. As a tenured employee, she was terminated in violation of hospital "for cause" policy and in violation of her contract of employment.

2. The Defendant demoted her, reduced her rate of pay, subjected her to unequal terms and conditions of employment,

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undermined her authority, and held her up to scorn and ridicule of peers, which generated a hostile working environment, and ultimately resulted in Defendant terminating Plaintiff on November 21, 1991. Defendant's alleged actions were:

a. in retaliation for Plaintiff's opposition to SFH practice of providing unequal terms and conditions of employment because of her sex; and

b. in retaliation for filing charge of discrimination under ADEA, 29 U.S.C. §623(d), and under Title VII, 42 U.S.C. 2000e-3(a).

Defendant states in its Motion and Brief in Support of Motion for Summary Judgment (Docket #50):

1. It was the routine custom and habit of SFH to post positions. Ray Weaver learned of the position by "job posting on the job posting board in the lobby of the hospital." Bennie Crowder "saw senior operations analyst position posted on bulletin board by cafeteria."

SFH felt some changes were needed in Department 912, the computer department. Weaver applied for and received the position of Senior Operations Analyst. Partney did not apply for the position. SFH felt an "outsider" like Weaver would be the necessary catalyst of change in the department.

Partney complained to her supervisor, Charles Harlan, that Weaver's promotion was discriminatory. However, Harlan did not mention Plaintiff's complaint to anyone. In July an internal employee problem-solving process or "grievance" was filed by Plaintiff. Don Burgess, Director of Management Information

Services, received a copy of the July 1990 grievance but did nothing with it since he felt it should start with Charles Harlan and work up the chain of command.

Things deteriorated after the reorganization changes in August 1990. Two employees in Department 912 were demoted, Charles Harlan and Eddie Scully, both males under 40. In addition to other reassignments, Partney made a lateral move to Jr. Operations Analyst, which position was within the same grade, salary range, and with a 4% increase in pay. SFH did not require posting of potential changes in positions since these reassignments were not considered job vacancies.

In January 1991 Partney was temporarily assigned to Client Support Services at the Help Desk, Department 908. A level of discomfort had been created in the department because of the dramatic changes being made by Weaver. Burgess "wanted to save Gaye's employment at SFH" and became aware of a vacancy in Department 908. He felt this would allow time for the personality conflict between Weaver and Partney to "cool down."

During the temporary assignment to Help Desk, beginning in May 1991, Russell McMahon who was the Manager of Client Support Services "began to have problems with Partney."

After Partney's move to Department 908, Burgess received another grievance, dated January 8, 1991, a two-page memo with 14 attachments, totalling 50 pages. Basically, Partney complained that things should go back to the way they were before the changes were made in August 1990, and she disliked Weaver.

Burgess investigated her concerns, one of which was frequent and indiscriminate use of cursing, indecent remarks, and inappropriate jokes, made by Weaver. He determined that Weaver never swore or cursed directly at any of employees. Although Burgess discussed the issue with Weaver, he never heard complaints from anyone other than Partney.

On January 29, 1991, Burgess met with Partney, Weaver, and Spaid to address Partney's suggestions and grievances. Burgess met with Partney again on February 4, 1991 to address her grievance. Partney never mentioned the word "discrimination" in any of the meetings.

Partney then filed an EEOC charge of discrimination against Saint Francis Hospital on August 9, 1991 (Exhibit J - Defendant's Appendix Volume II[1]), stating:

(1) She was demoted in responsibility;

(2) A male with less on-the-job skill was promoted;

(3) She had been ASKED to resign numerous times; and,

(4) She was "the most senior in age in Dept 912."

Finally, on October 30, 1991, R. McMahon, Manager of Dept. 908, received a complaint from Linda Hunter regarding Partney. McMahon indicated Partney's response was inappropriate and Partney could not take constructive criticism.

In September-October 1991 Burgess "became aware that Gaye's former position in Department 912 would again be open." Partney

[1] Docket #77 - Appendix by Defendant St. Francis Hospital to Defendant's Reply in Support of the Motion of Summary Judgment (Docket #76), filed March 11, 1994.

was given the option to return to Dept. 912 as Jr. Operations Analyst. Burgess instructed Weaver "that he was to do all he could do to make it work." Burgess then met with Partney on October 4, 1991, and subsequently received a written response from Partney October 7, 1991, with five conditions, which were:

1. If Ray Weaver has any problems with me I must receive it in writing with a full explanation, detailing who, what, when, where, and how.

2. There must be no profanity or dirty jokes in my presence or within my hearing. I have the right to work in a non-hostile environment and be treated with respect.

3. If I will be required to backup Debbie Snodgrass and/or oversee any operator duties/training, I should be upgraded to Sr. Operations Analyst with a 10% increase in pay. And I will not be required to "fill in" as an operator.

4. It will be made clear to Ray Weaver that I will be allowed to continue my career path of education, etc. that was interrupted in 1990. No career path was ever given to me so I developed my own. I have the right to attend NMA or other classes/seminars that will benefit St. Francis, computer operations, and myself professionally. My job responsibilities, as always, will receive top priority.

5. I will not be forced to the strict adherence of the hours 08:00 to 16:30 as before. I should have the freedom of arriving to work early since I am an exempt employee and do not receive any overtime pay."

Burgess felt the conditions were a request for special treatment. Although he would do his best to see that Partney was treated properly, he would not make special arrangements for her. "Gaye also asked me if she could stay in Dept. 908. I had not considered

this option, but once considered, I agreed that she could stay if that is what she wanted to do." Burgess informed Partney she could be transferred but the position was Client Support Specialist I, a non-exempt position. She would be paid the highest level in that pay range, but it was less pay than the Jr. Operation Analyst.

Partney also requested a meeting with R. Liguori, Director of Human Resources. Weaver and Burgess were invited to the October 10, 1991 meeting with Partney and Liguori. R. Liguori explained the options.

The following day Partney was absent from work and remained absent from October 11, 1991 through October 18, 1991. She reported to work and to the Help Desk on October 21, 1991. She was again absent from work from October 31 to November 14, 1991.

During a routine departmental review of employee attendance, R.McMahon, Manager of Dept. 908, sent a notice, dated November 4, 1991, to Partney indicating she had 21.34 days of absence time. "You are hereby put on notice that your attendance record must show evidence of immediate improvement going forward to avoid further disciplinary action." No employee at SFH is allowed to indefinitely remain absent merely because they do not feel like coming to work. McMahon waited to receive medical evidence to support Partney's absences. However, he received none and advised Partney that her not calling in and her failure to provide medical evidence constituted a "no call, no show resignation." Partney knew that medical documentation was required for these absences.

Plaintiff attempted to secure a work release, but Dr. Ryker

testified that "no extended work release for 30 days was necessary based on his initial examination of Partney." Also Dr. Harris testified that "a disability leave medical authorization was not appropriate. Partney was "less interested in defining and seeking treatment for her psychiatric condition as opposed to attempting to obtain a medical work release."

By November 11, 1991, the second client complaint letter was received. The memorandum from Vicki Krafft, Warren Clinics, references "Help Desk Communication Problems: "...several of our ongoing problems could have been resolved more quickly if the proper messages had been relayed to the appropriate personnel in a timely manner. Specifically the problem seems to rest with Gaye Partney. Time after time she has failed to convey messages to DP personnel of problems reported by WCI."

Subsequently on November 21, 1991 by letter from R. McMahon to Partney she was terminated.

By Order dated April 5, 1994 (Docket #88) Defendant's Motion for Summary Judgment was GRANTED with respect to Plaintiff's (1) entire breach of contract claim, (2) retaliation claim as alleged to be caused by Plaintiff's April 1990 statement, July 1990 grievance, and January 1991 grievance, and (3) intentional infliction of emotional distress claim. Defendant's Motion for Summary Judgment was DENIED with respect to Plaintiff's (1) claim of retaliation as alleged to be caused by her August 1991 EEOC complaint and (2) claim for wrongful discharge in violation of Oklahoma public policy. Defendant's Motion in Limine was RESERVED

until presentation of evidence at trial.

Discussion

To establish a prima facie case of retaliation under Title VII, the plaintiff must show (1) she engaged in protected opposition to statutorily prohibited discrimination or participated in a statutorily permitted proceeding, (2) the employer took adverse action contemporaneously or subsequent to the employee's protected activity, and (3) a causal connection exists between the protected activity and the adverse employment action. Anderson v. Phillips Petroleum Co., 861 F.2d 631, 634 (10th Cir.1988).

Partney claims that her age and/or gender were considered negative/determining factors denying her an opportunity for advancement and promotion clearly within her career path with respect to the promotions given to Ray Weaver, a male under 40. The record indicates that the job for Senior Operations Analyst was posted and Partney did not apply for the position. Partney lacks competent evidence and makes conclusory allegations that she was the better candidate for the Sr. Operations Analyst position, a position for which she did not apply but yet argues to the Court she should have received.

Partney states in her affidavit she had approximately twenty years experience in the computer services field, had obtained 41 credit hours toward a computer science degree, and had been a supervisor within the computer department. Weaver had come from Occidental Petroleum and acted in a supervisory capacity at that company. He appeared to have great initiative and the knowledge of

the system to which SFH was converting. Weaver did performance appraisals and evaluations, filling positions and firing, if necessary. Weaver had twenty years in data processing, the last eight doing analyst type work. Partney further argues that when Defendant promoted Weaver to Manager, a position which was not vacant and which did not require posting, it discriminated against her. Companies are often presented with the dilemma of promoting one employee from a group of employees with excellent backgrounds. Discriminatory intent is not necessarily implicated when one of those qualified employees is not chosen. Hooks v. Diamond Crystal Specialty Foods, Inc., 997 F.2d at 798 (10th Cir.1993).

Partney claims that when she attempted to assert her position in response to the "Weaver promotions" the Defendant retaliated by demoting her, reducing her rate of pay, subjecting her to unequal terms and conditions of employment. In the summer of 1990 dramatic departmental changes and several reassignments at Saint Francis Hospital were made. Walt Spaid became responsible for Dept. 912. Ray Weaver was promoted to Manager; Charles Harlan was demoted to Operations Coordinator; Eddie Scully was demoted to Data Control Analyst; Debbie Snodgrass was promoted to Data Control Coordinator; and Gaye Partney was laterally moved to the position of Jr. Operations Analyst and given a raise." Partney's rate of pay went from $11.34 to $12.00 an hour. Partney agrees she received a "nominal raise" even though she was "moved to Department 908 where she had fewer responsibilities." Partney would also have the Court believe that she was the "most senior" in Dept. 912 affected

by these reassignments, but the record reveals that at least two other employees, both of which were male, were as old as, or older than, she. The Court concludes that her age was not a determining factor in the reassignment.

On January 3, 1991, Partney was transferred to Client Support Services at the Help Desk. During May 1991 through November 1991, four complaints were filed against her. Plaintiff contends that Defendant's method of handling these complaints "imply retaliation in connection with the EEOC complaint."

However, she also argues that the fact she was no longer included in staff meetings shows retaliation for her filing of the grievances. The Court is unclear from the record as to which department she was assigned at the time she was allegedly excluded. Moreover, Plaintiff admits that she was not the only employee excluded from these meeting. The Court concludes that exclusion does not support Plaintiff's argument of retaliation.

Partney was given the opportunity of returning to Dept. 912 as Junior Operations Analyst. Partney asked if she could remain in Dept. 908 in Client Services. Although this had not been initially considered, Saint Francis was willing to accommodate Partney. However Partney agreed to return to Dept. 912 upon the previously stated five conditions.

Saint Francis argues that in the face of its attempt to reasonably accommodate Partney, it was confronted with additional complaints about Partney in addition to her excessive absences without proper medical documentation. Partney argues that as a

result of defendant's retaliation she was demoted and the "no call, no show" reason for discharge is pretextual. Partney has not presented any evidence showing the reason may be pretextual. Where Title VII prohibits all discrimination in employment based upon race, sex and national origin, "it does not demand that an employer give preferential treatment to minorities or women." 42 U.S.C. §20003-2(j). See Steelworkers v. Weber, 443 U.S. 193, 205-206, 99 S.Ct. 2721, 2728-2729, 61 L.Ed.2d 480 (1979). The statue was not intended to "diminish traditional management prerogatives." Id., at 207, 99 S.Ct., at 2729.

Judge Thomas R. Brett's Order of April 5, 1994 granted the motion of defendant for summary judgment in all respects except two: (1) plaintiff's claims for retaliation under Title VII and the ADEA survived only as to plaintiff's filing of her EEOC complaint in August 1991; (2) plaintiff's claim for wrongful discharge in violation of Oklahoma public policy survived only because the federal claims mentioned in (1) also survive. In other words, if summary judgment is granted in full as to plaintiff's federal claims, it must also be granted as to plaintiff's state law claims because the federal statutes constitute the public policy allegedly violated by the discharge.

In regard to the claim of discharge in retaliation for plaintiff's August 1991 EEOC charge, Judge Brett concluded that plaintiff had established a prima facie case, and that "Defendant moves for Summary Judgment only on the grounds that Plaintiff has failed to establish a prima facie case of retaliation." (Order at

14 n.7). Judge Brett therefore concluded that the burden of proof analysis of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) need not be employed. In its motion to reconsider, defendant points to pages 5 and 6 of its reply brief in support of its summary judgment motion, in which the defendant devoted one and one-half pages to the topic "No showing of pretext". Requesting the Court for the first time in a reply brief to move beyond the prima facie case issue did not give plaintiff adequate opportunity to respond. However, defendant has now raised the issue again in its motion to reconsider, has presented no new evidentiary materials and plaintiff has filed a response. The Court deems it appropriate to revisit the matter.

Defendant titles its present motion as one to reconsider "in light of new 10th Circuit standard regarding retaliation." Citing Meredith v. Beech Aircraft Corp., 18 F.3d 890 (10th Cir.1994), defendant says it is now clear "that the same burden shifting analysis utilized in non-retaliation discrimination cases applies equally to retaliation cases. This has not always been apparent from past decisions of this and other circuits." (Motion to Reconsider at 1). On the contrary, quite apparent is the following: "The general approach to Title VII suits set out in McDonnell Douglas . . . is also applicable to retaliation claims." Burrus v. United Telephone Co. of Kansas, Inc., 683 F.2d 339, 343 (10th Cir.1982). In Sorenson v. City of Aurora, 984 F.2d 349, 353 (10th Cir.1993), the court quoted the statement from Burrus and described the well-known McDonnell Douglas standard:

> A plaintiff must first establish a prima facie case of retaliation. If a prima facie case is established, then the burden of production shifts to the defendant to produce a legitimate, nondiscriminatory reason for the adverse action. If evidence of a legitimate reason is produced, the plaintiff may still prevail if she demonstrates the articulated reason was a mere pretext for discrimination. The overall burden of persuasion remains on the plaintiff.

A finding of pretext does not mandate a finding of illegal discrimination. EEOC v. Flasher Co., 986 F.2d 1312, 1321 (10th Cir.1992). A plaintiff is required to do more than prove that the articulated reasons for choosing her for termination are unworthy of belief. She is required to prove that "the reason for their lack of credence [is] the underlying presence of proscribed discrimination." Id. (quoting Holder v. City of Raleigh, 867 F.2d 823, 828 (4th Cir.1989). Plaintiff's summary judgment proof must consist of more than a mere refutation of the employer's legitimate nondiscriminatory reason, but must offer some proof that unlawful discrimination motivated the employer's action. Moore v. Eli Lilly & Co., 990 F.2d 812, 815-16 (5th Cir.), cert. denied, 114 S.Ct. 467 (1993). See also St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742 (1993). Even though all doubts must be resolved in the nonmovant's favor, allegations alone will not defeat summary judgment. Cone v. Longmont United Hospital Association, 14 F.3d 526, 530 (10th Cir.1994). The issue at this stage is whether plaintiff has offered sufficient evidence that a reasonable jury could find that defendant intentionally discriminated against her. Durham v. Xerox

Corp., 18 F.3d 836, 839 (10th Cir.1994).

With the appropriate standard in view, the Court reviews the evidence presented. Defendant has offered legitimate, nondiscriminatory reasons for plaintiff's discharge: failure to show up for work for two weeks, failure to provide medical documentation to justify her absences and performance problems. Plaintiff concedes that the defendant's Director of Personnel told her on October 10, 1991 that she must have medical documentation to support her absences. (Response to Defendant's Motion for Summary Judgment at 22, ¶18). It is also not disputed that hospital policy required the doctor's statement within five days after an absence and that plaintiff had not provided her documentation after more than a month. Plaintiff submitted her own affidavit in response to defendant's motion for summary judgment. At paragraph 20 of the affidavit, she states: "Using the 'no-call, no-show' reason for my termination was a pretext." Plaintiff's contention that this self-serving statement is sufficient to create a genuine issue of material fact, thereby defeating a summary judgment motion, is rejected. Plaintiff has not presented evidence from which a reasonable jury could conclude that the reasons for discharge offered by defendant were in fact pretexts for retaliation against plaintiff. Therefore, the Court concludes that summary judgment is appropriate in favor of the defendant as to plaintiff's federal claims.

As stated earlier, the plaintiff's state law claim of discharge in violation of public policy basically mirrors or

parallels her claims under Title VII and the ADEA. See Sanchez v. Philip Morris, Inc., 992 F.2d 244, 248 (10th Cir.1993). In a recent unpublished opinion, the United States Court of Appeals for the Tenth Circuit stated : "It is appropriate to use the burden-shifting formulation established for assessment of federal employment discrimination actions . . . to analyze plaintiff's public policy tort claim." Tatum v. Philip Morris, Inc., 16 F.3d 417, 1993 WL 520983 at n.3 (10th Cir.(Okl.)). Therefore, since plaintiff's federal claims fail to survive summary judgment, her parallel state law claim likewise fails.

The Court has also thoroughly reviewed plaintiff's motion to reconsider the April 5, 1994 Order. Seeing no error, the motion is denied.

Conclusion

The motion of the defendant to reconsider is hereby GRANTED. Summary judgment is GRANTED as to Plaintiff's claims of (1) wrongful termination in violation of Oklahoma public policy and (2) retaliation under Title VII and ADEA in response to Partney's filing of the EEOC complaint. In all other respects, the Order of April 5, 1994 is affirmed and the motion of the plaintiff to reconsider is hereby DENIED. Having disposed of all claims, this Order constitutes a final Order in this case.

Terry C. Kern

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PROPERTY COMPANY OF AMERICA REALTY, INC., a Texas corporation,	)	
Plaintiff,	)	
v.	)	Case No. 94-484-K
MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, a Massachusetts corporation,	)	
Defendant.	)	

ORDER OF DISMISSAL WITH PREJUDICE

On this 29 day of August, 1994, upon written application of the parties for an order of dismissal with prejudice of the Complaint and all causes of action, the Court, having examined said application, finds that said parties have entered into a compromise settlement covering all claims involved in the Complaint and have requested the Court fo dismiss the Complaint with prejudice to any future action, and the COurt, having been fully advised in the premises, finds that said Complaint should be dismissed. It is, therefore,

ORDERED, ADJUDGED and DECREED by the Court that the Complaint and all causes of action of the Plaintiff filed herein against the Defendant be and the same are hereby dismissed with prejudice to any further action.

s/ TERRY C. KERN

JUDGE, UNITED STATES
DISTRICT COURT

DCV/dmt

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

CRAIG HOSPITAL, a Colorado non-profit organization, and LESTER BUTT,	)	
Plaintiffs,	)	
vs.	)	***CASE NO.: 94-C-97-K***
RAY BAYS, individually d/b/a RAY BAYS & ASSOCIATES, and JEROME D. GONSHOR, JR., individually,	)	
Defendants.	)	

ADMINISTRATIVE CLOSING ORDER

On the representations from counsel that the parties have reached a settlement and compromise, it is ordered that the clerk administratively terminate this action for a period of sixty (60) days in order to allow parties to file the appropriate documents and finalize the above captioned matter.

It is so ordered this 29 day of August, 1994.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DARLA SCHOOLEY,

Plaintiff,

vs.

INDIAN HEALTH SERVICE OF THE UNITED STATES DEPARTMENT OF PUBLIC HEALTH, PHYLLIS MCCARTY, CHARLOTTE M. CUNY, and FRANK O'DONEL,

Defendants.

Case No. 94-CV-475-K

ORDER

UPON Plaintiff's Motion pursuant to the Federal Rules of Civil Procedure, Rule 41 (a)(1)(i) to dismiss the captioned case without prejudice, and for good cause shown, it is hereby

ORDERED, that the Plaintiff's captioned case is dismissed without prejudice.

DATED this 29 day of August, 1994.

Terry C. Kern
United States District Judge

Submitted by:

KATHERINE T. WALLER, OBA No. 15051

By Katherine T. Waller
KATHERINE T. WALLER, OBA No. 15051
LEBLANG & CLAY
7666 E. 61st, Ste. 251
Tulsa, Oklahoma 74133
(918) 254-1414

Attorney for Plaintiff

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

PORT CITY PROPERTIES, INC., d/b/a HODGES WAREHOUSE,

Plaintiff,

v.

JERRY V. MATHESON, Director of the Transportation Division of the Corporation Commission of of the State of Oklahoma,

AND

J.C. WATTS, CHAIRMAN, CODY L. GRAVES, VICE-CHAIRMAN, BOB ANTHONY, COMMISSIONER, COMMISSIONERS OF THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA,

Defendants.

Case No. 94-C-760-BU

ORDER

Upon presentation and consideration of the Complaint for Declaratory Judgment filed on August 4, 1994, the Court finds that the issues in this matter involve an interpretation of a motor carrier certificate issued by the Interstate Commerce Commission. The Court further finds that the interpretation of the certificate is within the special expertise of the Interstate Commerce Commission. Accordingly, the Court

1. ORDERS that this matter be referred to the Interstate Commerce Commission for its determination of whether the motor carrier operations of the plaintiff, Port City Properties, Inc., d/b/a Hodges Warehouse, is authorized by the certificate issued by the Interstate Commerce Commission;

2. ORDERS that the Court will retain jurisdiction over this proceeding;

3. DIRECTS the Clerk of the Court to administratively close this matter pending resolution of the issues referred to the Interstate Commerce Commission.

ENTERED this 26 day of August, 1994.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ONE 1974 CHEVROLET PICKUP,
VIN CKY1445181839,

Defendant.

CIVIL ACTION NO. 94-C-66-BU

JUDGMENT OF FORFEITURE

This cause having come before this Court upon the plaintiff's Motion for Judgment of Forfeiture by Default and by Stipulation against the defendant vehicle and all entities and/or persons interested in the defendant vehicle, the Court finds as follows:

The verified Complaint for Forfeiture In Rem was filed in this action on the 24th day of January 1994, alleging that the defendant vehicle was subject to forfeiture pursuant to 18 U.S.C. § 512(a), which provides that if an identification number for a motor vehicle or motor vehicle part is removed, obliterated, tampered with, or altered, such vehicle or part shall be subject to seizure and forfeiture to the United States.

Warrant of Arrest and Notice In Rem was issued on the 24th day of January 1994, by the Clerk of this Court to the United States Marshal for the Northern District of Oklahoma for the seizure and arrest of the defendant vehicle and for publication in the Northern District of Oklahoma.

On the 10th day of March 1994, the United States Marshals Service served a copy of the Complaint for Forfeiture In Rem, the Warrant of Arrest and Notice In Rem, and the Order on the defendant vehicle.

Danny Jones and Jimmy L. Jones were determined to be the only potential claimants in this action with possible standing to file a claim to the defendant vehicle. No claim has been filed by Danny Jones. Jimmy L. Jones filed a Claim and Answer pro se on March 15, 1994. A withdrawal of the claim of Jimmy Jones was filed August 19, 1994. The plaintiff, United States of America has agreed to return to Claimant Jimmy L. Jones the cost and claim bond, which he posted in the administrative action, in the amount of $300.

USMS 285s reflecting the service upon the defendant vehicle and all known potential claimants are on file herein.

All persons or entities interested in the defendant vehicle were required to file their claims herein within ten (10) days after service upon them of the Warrant of Arrest and Notice In Rem, publication of the Notice of Arrest and Seizure, or actual notice of this action, whichever occurred first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claim(s).

No other persons or entities upon whom service was effected more than thirty (30) days ago have filed a Claim, Answer, or other response or defense herein.

The United States Marshals Service gave public notice of this action and arrest to all persons and entities by advertisement in the Tulsa Daily Commerce and Legal News, a newspaper of general circulation in the district in which this action is pending and in which the defendant vehicle is located, on April 14, 21, and 28, 1994. Proof of Publication was filed May 23, 1994.

No other claims in respect to the defendant vehicle have been filed with the Clerk of the Court, and no other persons or entities have plead or otherwise defended in this suit as to said defendant vehicle, and the time for presenting claims and answers, or other pleadings, has expired; and, therefore, default exists as to the defendant vehicle, and all persons and/or entities interested therein.

One investigation report by the Federal Bureau of Investigation (FBI) recites the vehicle identification number (VIN) of this vehicle as CKY1445181839; while all other reports indicate it to be CKY144S181839; that the VIN number used in the style of this case and in all prior documents and pleadings filed in this matter indicate it to be CKY1445181839. The TRACS Investigation Report of the Tulsa Police Department indicate this to be a renumbered vehicle, with the VIN as CKY144S181839. The

vehicle, which was seized under 18 U.S.C. § 512(a), since the vehicle identification numbers had been altered, has numerous VIN numbers, none of which are the true VIN numbers.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the following-described defendant vehicle:

ONE 1974 CHEVROLET PICKUP,
VIN CKY1445181839,

for which the VIN is sometimes indicated to be CKY144S181839, be, and it hereby is, forfeited to the United States of America for disposition according to law.

IT IS FURTHER ORDERED by the Court that the cost and claim bond in the sum of sum of Three Hundred Dollars ($300.00) posted by Claimant Jimmy L. Jones, be returned to him by mailing to him at Route 1, Box 235, Salina, Oklahoma 74365.

Entered this 26 day of August 1994.

s/ MICHAEL BURRAGE

MICHAEL BURRAGE
United States District Judge

APPROVED:

CATHERINE DEPEW HART
Assistant United States Attorney

N:\UDD\CHOOK\FC\JONES.JL\04109

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

State of Oklahoma, ex rel. Department of Transportation, Plaintiff,	)	
vs.	)	Case No. 94-C-725E
U.S. Department of the Interior, Bureau of Indian Affairs; Cherokee Housing Authority; Glen Scott Phillips and Donna Phillips, husband and wife; and the Mayes County Treasurer, Defendants.	)	

D I S M I S S A L

COMES NOW attorney for plaintiff, State of Oklahoma, ex rel. Department of Transportation, and dismisses the above captioned proceedings.

Respectfully submitted,

STATE OF OKLAHOMA, EX REL
DEPARTMENT OF TRANSPORTATION

MARK JAMES CAYWOOD, CHIEF
LEGAL & BUSINESS SERVICES DIVISION

By: _____

WILLIAM RINEHART, OBA #12837
Staff Attorney
200 N.E. 21st Street
Oklahoma City, OK 73105
(405) 521-2681

cherokee.dsm
sbb 082994

CERTIFICATE OF MAILING

This is to certify that on the 29th day of August, 1994, a true and correct copy of the above and foregoing DISMISSAL was mailed, postage prepaid, to all defendants or their attorneys of record.

cherokee.dsm
sbb 082994

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, v. Undetermined quantities of articles of drug, gas and liquid oxygen for medical use in high pressure cylinders and cryogenic home units, et al., Defendants.	)	CIVIL NO. 93-C-840-B CONSENT DECREE OF CONDEMNATION AND RECONDITIONING

Plaintiff, United States of America, by this District's United States Attorney, Stephen C. Lewis, and Assistant United States Attorney, Catherine Depew Hart, filed a complaint for forfeiture on September 16, 1993, against defendant articles of drug. Pursuant to a warrant of arrest issued by this Court, the United States Marshal for this District seized the articles of drug on September 17, 1993. Thereafter, notice of the complaint and seizure was duly published in accordance with the applicable rules of this Court. On or about October 1, 1993, American Respiratory, Inc. ("ARI"), a medical oxygen repacker located at 3220 East 21st Street, Tulsa, Oklahoma 74114, by its President David P. Daniel, intervened and filed claim to all the seized articles. After ARI amended its claim, this Court entered a Consent Decree of Condemnation and Permanent Injunction against ARI on May 10, 1994, excluding 12 seized articles of drug identified below.

On or about October 14, 1993, Big Three Industrial Gas, Inc., a Delaware corporation, intervened and filed a claim for 12

of the seized articles of drug, bulk medical oxygen in high pressure cylinders of two sizes, known as "T" and "J" tanks, identified by serial number as follows:

S/N No. 467095	S/N No. 35337
S/N No. 9456	S/N NO. 392787
S/N No. 9865	S/N No. 384937
S/N No. 382194	S/N No. 450357
S/N NO. 359029	S/N No. 388708
S/N No. 365878	S/N No. 9099

The relevant portion of the complaint alleges that these articles are drugs adulterated while held for sale after shipment in interstate commerce, within the meaning of the Federal Food, Drug, and Cosmetic Act (the "Act"), 21 U.S.C. § 351(a)(2)(B), in that the methods used in, and the facilities and controls used for, their manufacture, processing, packing, and storing do not conform to and are not operated and administered in conformity with current good manufacturing practice (CGMP) regulations to assure that such articles meet the safety requirements of the Act and have the identity and strength, and meet the quality and purity characteristics they purport to possess.

Claimant Big Three Industrial Gas, Inc., which is now doing business as Air Liquide America Corporation ("ALAC"), is a bulk medical oxygen supplier doing business at 1319 North Peoria Avenue, Tulsa, Oklahoma 74106, within the jurisdiction of this Court. Claimant ALAC provides and distributes bulk oxygen to medical oxygen manufacturers in Oklahoma, including to ARI, which repacked ALAC's oxygen into smaller high pressure cylinders for distribution to prescription patients. For this purpose, Claimant ALAC had delivered the 12 bulk oxygen cylinders

identified herein to ARI. These cylinders were shipped in interstate commerce to Claimant ALAC.

Claimant ALAC affirms that it is the sole owner of the 12 seized articles of drug. Claimant ALAC agrees to defend and hold the United States of America (including its employees and attorneys) harmless should any party or parties hereafter intervene in this action and file a claim to all or any part of the articles subject to this Decree.

Claimant ALAC, without admitting the allegations in the complaint and disclaiming any liability in connection therewith, having appeared and consented to entry of this Decree without contest and before any testimony has been taken, and the United States of America having consented to the entry of this Decree, and having moved this Court for a Consent Decree of Condemnation and Reconditioning:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. This Court has jurisdiction over the subject matter and over all parties to this action.

2. The seized articles, high pressure cylinders and the gases contained therein, are drugs within the meaning of the Act, 21 U.S.C. § 321(g), which are adulterated within the meaning of 21 U.S.C. § 351(a)(2)(B) as alleged in the complaint, and are held in violation of the Act, 21 U.S.C. § 331(k), and, therefore, are hereby condemned and forfeited to the United States of America pursuant to 21 U.S.C. § 334(a).

3. Pursuant to 21 U.S.C. § 334(e), the United States of America shall recover from Claimant ALAC court costs and fees, storage costs, if any, and other proper expenses.

4. The United States Marshal for this District shall release the articles from the Marshal's custody to the custody of Claimant ALAC for the sole purpose of attempting to bring the articles into compliance with the Act if Claimant, within thirty (30) days after entry of this Decree: (a) pays in full the court costs and fees, and storage and other proper expenses of this proceeding, and (b) executes and posts with the Clerk of this Court a good and sufficient penal bond with surety in the amount of one hundred eighty dollars ($180.00) payable to the United States of America, and conditioned on Claimant abiding by and performing all the terms and conditions of this Decree and of such further orders and decrees as may be entered in this proceeding.

5. After filing the bond with the Clerk of the Court, Claimant ALAC shall give written notice to the Director of the Dallas District Office, United States Food and Drug Administration, 3310 Live Oak Street, Dallas, Texas 75204, that Claimant ALAC, at its own expense, is prepared to attempt to bring the articles of drug into compliance with the Act by purging the 12 cylinders of their contents under the supervision of a duly authorized representative of the United States Food and Drug Administration ("FDA representative").

6. Claimant ALAC shall not commence attempting to bring the condemned articles into compliance until Claimant submits a written proposal for this purpose and receives written authorization from an FDA representative.

GENERAL PROVISIONS

7. Claimant ALAC shall at no time, and under no circumstances whatsoever, ship, sell, offer for sale, or otherwise dispose of any part of the condemned articles, until: (a) an FDA representative has had free access to them in order to take any samples or make any tests or examinations that are deemed necessary, and (b) the FDA representative has released in writing such articles of drug for shipment, sale or other disposition.

8. Claimant ALAC shall at all times, until the articles have been released by the FDA representative pursuant to paragraph 7(b) herein, retain intact each article of drug seized for examination or inspection by FDA, and shall maintain the records or other proof necessary to establish the identity of the articles to the satisfaction of the FDA representative.

9. Within thirty (30) days after filing the bond with the Clerk of the Court, Claimant ALAC shall complete the process of attempting to bring the articles of drug into compliance with the Act under the supervision of the FDA representative, as authorized herein.

10. Claimant ALAC shall abide by the decisions of the FDA representative, whose decisions shall be final. If Claimant ALAC

breaches any conditions stated in this Decree, or in any subsequent decree or order in this proceeding, Claimant ALAC shall return the articles immediately to the United States Marshal for this District at Claimant's expense, or shall dispose of them pursuant to an order of this Court.

11. Claimant ALAC shall not sell, dispose, or distribute the articles or any part of them in any manner to any person or business who is not operating in conformity with current good manufacturing practice regulations, 21 C.F.R. Parts 210 and 211, or otherwise sell, dispose, or distribute the articles or any part of them in any manner that is contrary to the provisions of the Act, or the laws of any state or territory (as defined in the Act) in which they are sold, disposed, or distributed.

12. Claimant ALAC shall compensate the United States of America for expenses for reconditioning review and FDA supervision as follows: $49.00 per hour and any fraction thereof per representative for supervision and/or inspectional work; $59.00 per hour and any fraction thereof for laboratory and analytical work; $0.25 per mile for travel expenses; $113 per day for subsistence expenses where necessary; and any other necessary expenses incurred in connection with the supervisory responsibilities of FDA required under this Decree.

13. If requested by an FDA representative, Claimant ALAC shall furnish duplicate copies of invoices of sale of the released articles, or such other evidence of disposition as an FDA representative requests.

14. Claimant ALAC shall compensate the United States for the cost of this inspection at the rates set forth in paragraph 12 of this Decree.

15. An FDA representative shall notify Claimant ALAC, in writing, when the conditions of this Decree have been met. The United States Attorney for this District, on being advised by the FDA representative, that the conditions of this Decree have been performed, shall transmit such information to the Clerk of this Court, whereupon the bond given in this proceeding shall be cancelled and discharged.

16. In the event Claimant ALAC does not repossess the condemned articles pursuant to the conditions set forth herein, the United States Marshal for this District shall destroy the condemned articles under the supervision of an FDA representative without further order by this Court.

17. This Court retains jurisdiction to issue further decrees and orders as may be necessary for the proper disposition of this proceeding. Should Claimant ALAC fail to abide by and perform any of the terms and conditions of this Decree, or of such further order or decree as may be entered in this

proceeding, or of the bond, then, on motion of plaintiff, the bond shall be forfeited and judgment entered in favor of plaintiff.

SO ORDERED this 29th day of August 1994.

S/ THOM[illegible]TT
UNITED STATES DISTRICT JUDGE

CONSENTED TO:

ARTHUR SLAUGHTER
Assistant Secretary
Air Liquide America Corp.

LISA ANN LEE
Tate & Associates
206 South 2nd Street
Richmond, Texas 77469
(713) 341-0077
Attorneys for Claimant ALAC

STEPHEN C. LEWIS
United States Attorney

BY: CATHERINE DEPEW HART
Assistant United States Attorney

OF COUNSEL
MARGARET JANE PORTER
Chief Counsel
ARETA L. KUPCHYK
Assistant Chief Counsel for Enforcement
Food and Drug Administration
5600 Fishers Lane, GCF-1
Rockville, Maryland 20857
(301) 443-4350

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 29 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CHRISTINA L. COLEMAN,

Plaintiff,

vs.

BLUE CROSS BLUE SHIELD OF OF OKLAHOMA,

Defendant.

Case No. 94-C-88-BU

ENTERED ON DOCKET

DATE AUG 30 1994

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 26 day of August, 1994.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. BRIAN KEITH ALLEN; KELLY ELIZABETH ALLEN; CITY OF OWASSO, OKLAHOMA; THE STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	CIVIL ACTION NO. 94-C-130-B

FILED

AUG 29 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney, and for good cause shown it is hereby ORDERED that this action shall be dismissed without prejudice.

Dated this 29th day of August, 1994.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

NEAL B. KIRKPATRICK
Assistant United States Attorney
3600 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

NBK:flv

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE AUG 30 1994

GOLDEN RULE INSURANCE COMPANY,

Plaintiff,

v.

JIMMIE NAIFEH, JR.,

Defendant.

Case No. 93-C-922 B

FILED
AUG 29 1994
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT

In accord with the Order filed this date sustaining the Plaintiff's Motion for Summary Judgment, the Court hereby enters Judgment in favor of the Plaintiff, Golden Rule Insurance Company, and against the Defendant, Jimmie Naifeh, Jr., on all claims. Costs are assessed against Defendant and each party is to bear its own attorneys fees.

DATED this 29th day of August, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GOLDEN RULE INSURANCE COMPANY,)
)
Plaintiff,)
) Case No. 94-C-222-B
v.)
)
JIMMIE NAIFEH, JR.,)
)
Defendant.)

O R D E R

Now before the Court for its consideration is the Motion for Total Summary Judgment pursuant to F.R.Civ.P. Rule 56, filed by Plaintiff Golden Rule Insurance Company (docket # 25) against Defendant Jimmie Naifeh Jr. Also before the Court is a Motion for Partial Summary Judgment (docket #32) and a Motion to Strike the Affidavit of Harvey M. Lewis (docket #38) filed by the Plaintiff Golden Rule Insurance Company.

The undisputed facts are essentially these:

1. On September 26, 1991, Jimmie Naifeh Jr., (Naifeh) applied for health coverage for himself, his wife and his daughter with the Defendant Golden Rule Health Insurance Company (Golden Rule).

2. Naifeh and his wife signed their names on the application which included a clause that they had personally completed the application and that the information and statements supplied by them on the application were "true, complete and correctly recorded to the best of my knowledge."

3. The application also provided that the applicants understood and agreed that incorrect or incomplete information on

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the application could result in a loss of coverage or denial of a claim under the insurance policy.

4. Golden Rule subsequently issued a health insurance certificate to Naifeh in October 1991.

5. The cover page of the policy issued to Naifeh advised the insured to check the answers given by the insured on his application for insurance because under the policy an incorrect application could result in loss of coverage or claim reduction or denial.

6. The application required that the Naifehs supply information on their medical history. Question 15(e) of the application asked "Has any person named in #1, within the last 10 years, had any known indication, diagnosis, or treatment of: (e) any disorder of the digestive system (including ulcer, gastritis, intestinal disorders, colitis, gallstones, hemorrhoids, bloody stools or hernia); or disorder of the pancreas, liver, spleen or gallbladder?" Naifeh answered "yes" to this question.

7. Question 19 asked "Has any person named in #1, within the last 10 years, been hospital confined, had surgery or discussed surgery with a doctor?" Naifeh also answered "yes" to this question.

8. Question 20 asked that the applicant to list all the doctors that the persons applying for coverage had consulted in the past five years and to give full details about this question in question 21.

9. Question 21 of the application asked that the applicant

give complete details of any "yes" answers to questions 11 to 19.

10. In answering the application Naifeh stated that he had had surgery in 1984 for a hernia but he failed to disclose that he had been hospitalized from August 3 to August 6 1992.

11. Naifeh also did not provide information on abdominal pain, bloody stools, or inflammatory bowel disease for which he sought treatment in January 1991.

12. In response to the question concerning the doctors that he had consulted in the past five years, Naifeh stated that he had consulted with a Dr. Hale, and that said doctor had performed a physical on Naifeh. He also stated that a Dr. Jabour had performed a hernia surgery on Naifeh in 1984.

13. Naifeh did not disclose a 1989 consultation with Dr. Jabour concerning abdominal pain or a January 1991 consultation with a Dr. Gawey for abdominal pain and blood in stool. Naifeh also did not disclose a consultation with Dr. Jabour in July, 1991 for inguinal hernia and bowel symptoms.

14. Naifeh submitted medical bills to Golden Rule for payment after he had been hospitalized in July of 1992 for abdominal pain.

15. Pursuant to an investigation of the medical claims presented by Naifeh, Golden Rule obtained Naifeh's past medical records.

On October 13, 1993, Golden Rule filed for Declaratory Judgment against Defendant Naifeh for rescission of the defendant's policy and denial of the claims for the payment of

the medical bills of the defendant. Golden Rule claims that Naifeh misrepresented his medical history in his application for medical coverage to Golden Rule. Golden Rule argues that the information omitted by Naifeh in his application was material to the risk to be assumed by Golden Rule, and as such, the policy should be rescinded and the claims made by Naifeh be denied.

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, (1 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); Windon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342, 345 (10th Cir. 1986). cert den. 480 U.S. 947 (1987). In Celotex, 477 U.S. at 322 (1986), it is stated:

> "[T]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubts as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585-86, 106 S.Ct. 1348, 1355, 89 L.Ed.2d 538, (1986).

A party opposing a properly supported motion for summary

judgment may not rest upon mere allegations or denials of his pleadings, but must affirmatively prove specific facts showing there is a genuine issue of material fact for trial. **Anderson v. Liberty Lobby, Inc.**, supra, wherein the Court stated that:

> "... The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.." Id. at 252.

The Tenth Circuit requires "more than pure speculation to defeat a motion for summary judgment" under the standards set by **Celotex** and **Anderson**. **Setliff v. Memorial Hospital of Sheridan County**, 850 F.2d 1384, 1393.

Golden Rule argues that the policy it issued to Naifeh is void because he failed to disclose medical information on his application that was material to the risk assumed by Golden Rule in issuing the policy. Golden Rule argues that the fact that Naifeh failed to disclose his hospitalization for severe abdominal pain less than two months before his application and his failure to disclose that he had consulted with two doctors about severe abdominal pain eight months before his hospitalization constitutes misrepresentations that are material to the risk assumed by Golden Rule.

Naifeh argues that he answered all of the "yes" and "no" questions asked of him in a truthful manner and that he provided the names of specific physicians through which all the pertinent medical information could have been obtained by Golden Rule.

Under Oklahoma, Okla. Stat. tit. 36 §3609[1], misrepresentations, omissions, concealed facts, and incorrect statements prevent a recovery under an insurance policy if they are fraudulent, material to the acceptance of the risk or the hazard assumed, or the insurer would not have provided the coverage if the true facts had been known. The Oklahoma courts have found that if any of these conditions are satisfied, the insurer may avoid liability under the policy. **Dennis v. William Penn Life Assurance Co. of America**, 714 F.Supp. 1580, 1582 (W.D. Okla. 1989). The applicant's good faith or his intent in answering a question on an application for insurance is not relevant to the insurer's ability to avoid the policy. Id. Thus a misrepresentation by the insured, if material to the acceptance of the risk, need not be made with actual intent to defraud to be a basis for rescission of a policy by an insurer. Id. It is sufficient if the insured either knows, or should know, that he

---

[1]Okla.Stat. tit. 36, §3609(A) states:

> All statements and descriptions in any application for an insurance policy or in negotiations therefor, by or in behalf of the insured, shall be deemed to be representations and not warranties. Misrepresentations, omissions, concealment of facts, and incorrect statements shall not prevent a recovery under the policy unless:
>
> 1. Fraudulent; or
> 2. Material either to the acceptance of the risk, or to the hazard assumed by the insurer; or
> 3. The insurer in good faith would either not have issued the policy, or would not have issued a policy in as large an amount, or would not have provided coverage with respect to the hazard resulting in loss, if the true facts had been made known to the insurer as required either by the application for the policy or otherwise.

made an untrue statement. Id. A misrepresented fact is material if a reasonable insurance company in determining its course of action would attach importance to the fact misrepresented. Id. at 1583. Materiality can be decided as a matter of law if reasonable minds cannot differ on the question. Id.

It is clear that Naifeh failed to disclose a great deal of medical information on his application for insurance coverage. Although Naifeh may have answered the "yes" and "no" questions in a truthful manner, he did not follow up and fully answer question 21 which required him to give complete details for the questions to which he had answered "yes". The most significant event that he left out was his hospitalization just less than two months before his application. He also failed to give details on visits to doctors made for an obviously recurring abdominal pain. It is clear that Naifeh understood that the nature of question 21 required him to give details of his "yes" answers because he did list that he had surgery in 1984 for a hernia and that he had consulted with a doctor for a physical and said hernia. Answering "yes" or "no" to the questions on the applications was only part of the requirements of the application, the application clearly required that further information on the "yes" answers be given. Naifeh's answers to the questions were only partially truthful because of his failure to follow up with the complete details of his medical history. However, the application did not require that he give only partially truthful answers. It required that he give the whole truth concerning his medical history. It

is not reasonable to believe that Naifeh simply forgot the surgery or consultations with the doctors or that he mistakenly did not include them on his application. Naifeh did not forget a surgery that occurred some seven years earlier or a physical that resulted in a doctor's evaluation stating that everything was fine as far as Naifeh's health was concerned. Furthermore, under Oklahoma law the intent of Naifeh is irrelevant in determining whether a misrepresentation was made. Due to these facts, this court finds that Naifeh did in fact make material misrepresentations concerning his health on his September 26, 1991 application to Golden Rule.

The Court concludes that a reasonable insurer would attach importance to the fact that a medical insurance applicant had been hospitalized for at least 3 days for abdominal pain only six to seven weeks prior to his application for medical insurance. Such information would most probably prompt the insurer to investigate the nature of the hospitalization and to inquire into the outcome of treatment. The information obtained would likely result in either a denial of coverage or an exclusion as to future claims related to the subject of the problem for which the applicant was hospitalized.

Therefore, this Court concludes that Defendant did make misrepresentations on his application to Golden Rule, and that these misrepresentations were material to the acceptance of the risk by Golden Rule. As a matter of law, Golden Rule should be allowed to rescind the insurance policy on these grounds.

Golden Rule's Motion for Partial Summary Judgment on the bad faith issue is moot because of this Court's disposition in the matter of the Total Summary Judgment Motion. Notwithstanding, if Total Summary Judgment had not been granted, the motion for partial summary judgment on the issue of bad faith on the part of Golden Rule would have been favorably considered by the Court. Under Oklahoma law, "an insurer has an implied duty to deal fairly and act in good faith with its insured." Christian v. American Home Assur. Co., 577 P.2d 899, 904 (Okla. 1978). However, "tort liability may be imposed only where there is a clear showing that the insurer unreasonably, and in bad faith, withholds payment of the claim of its insured." Id. at 905. Furthermore, a bad faith claim will not "lie where there is a legitimate dispute." Ballinger v. Security Connecticut Life Insur. Co., 862 P.2d 68, 70 (Okla. 1993). To establish a bad faith claim, "the insured must present evidence from which a reasonable jury could conclude that the insurer did not have a reasonable good faith belief for withholding payment of the insured's claim." Oulds v. Principal Mutual Life Insur. Co., 6 F.3d 1431, 1436 (10th Cir. 1993).

There is a legitimate dispute in this case that would warrant the withholding the payment of Naifeh's claim. Upon conducting an investigation into a claim for medical bills by Naifeh, Golden Rule found that Naifeh had failed to disclose prior medical history that was of the same nature as the medical problems for which he was making a claim. A reasonable jury

could not find that Golden Rule did not have a legitimate reason for denying the claim because Naifeh has presented no evidence that Golden Rule was doing anything other than investigating what it considered to be grounds for recision.

The issues presented in Golden rule's Motion to Strike the Affidavit of Harvey M. Lewis are moot at this point.

CONCLUSION

This Court concludes that Defendant has failed to establish that genuine issues of material fact remain. Because no material issues of fact remain, and the issues of law have been resolved in favor of the Plaintiff, the Plaintiff Golden Rule Insurance Company's Motion for Total Summary Judgment (docket #25) should be and the same is hereby **GRANTED**. The remaining motions (docket #'s 32 and 38) are denied as moot.

IT IS SO ORDERED THIS 29th DAY OF AUGUST, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FILED

AUG 26 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

AMERICAN ECONOMY INSURANCE COMPANY, a foreign corporation,

Plaintiff,

vs.

CHERYL L. REEDER,

Defendant.

No. 93-C-991-B

ENTERED ON DOCKET
DATE AUG 29 1994

O R D E R

Before the Court for decision are the motions for summary judgment of the Plaintiff (Docket #6 and #15) and Defendant (Docket #11 and #17) pursuant to Fed.R.Civ.P. 56. Plaintiff, American Economy Insurance Company ("AEIC"), in its motion seeks a declaration of no uninsured motorist coverage extended to Defendant arising from the two-vehicle accident of June 2, 1989. Defendant, Cheryl L. Reeder, seeks a contrary uninsured motorist coverage declaration and additionally seeks a declaration of bad faith refusal against AEIC.

The uncontroverted facts are as follows:

1. Plaintiff is an insurance company and Defendant, Cheryl L. Reeder, is an individual who is an insured under a policy of automobile insurance written and issued by Plaintiff. [Complaint].

2. Charles L. Reeder is the named insured under American Economy Insurance Company policy number 02-CC-1234456-1 which described three Ford vehicles with an uninsured motorist limit of $500,000.00 on each vehicle and was in effect at all material and relevant times. [Complaint].

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3. Defendant, Cheryl L. Reeder, is an insured under the policy written by American Economy Insurance Company which includes a limit of liability of $1,500,000.00 for underinsured motorist coverage. [Stipulation in Case Management Plan].

4. Plaintiff has filed its declaratory judgment action demanding that this Court determine the legal rights of the parties and terminate the controversy over the uninsured motorist coverage in the policy. [Complaint].

5. Cheryl Reeder was injured on June 2, 1989 while riding in a northbound vehicle on Memorial Drive in Tulsa, when tort-feasor, Johnny Lewis, while driving under the influence of intoxication, crossed the center median and struck the vehicle in which Ms. Reeder was a passenger. [Stipulation in Case Management Plan].

6. Diana Kay Ramos, mother of Lewis, had an automobile liability insurance policy with Mid-Continent Casualty Company with limits of $10,000.00, which was paid to Cheryl Reeder by check dated May 31, 1991, which was paid on June 26, 1991. [Stipulation in Case Management Plan].

7. The statute of limitations of two years, 12 O.S. 95, ran on the claims against the tort-feasor on June 2, 1991, without a lawsuit having been filed against him. [Stipulation in Case Management Plan].

8. Approximately thirty days after the vehicle accident of June 2, 1989, attorney Glenn R. Beustring & Associates was employed to represent Defendant. Glenn R. Beustring & Associates, after reviewing the AEIC policy, advised Defendant and/or her father that

she had no uninsured motorist coverage. [Affidavit of Reeder, Defendant's Exhibit 1].

9. The Defendant did not know that she had uninsured motorist coverage extended by Plaintiff's insurance policy until she conferred with another lawyer, Gary Eaton, in February 1993, and he informed her she had such coverage with AEIC. Defendant's father then advised the local insurance agency for AEIC on March 31, 1993, of the accident and Defendant's claim. [Affidavit of Reeder, Defendant's Exhibit 1].

10. The parties have agreed that AEIC was not notified of the accident and injury until almost four years following the accident, i.e., either March 31, 1993 or June 2, 1993. [Stipulation in Case Management Plan].

11. The subject insurance policy written by AEIC is marked Exhibit A to Plaintiff's Brief in Support of Motion for Summary Judgment and provides in pertinent parts on page 9:

> "Section V-GARAGE CONDITIONS:
>
> "a. In the event of 'accident,' 'claim,' 'suit' or 'loss,' you must give us or our authorized representative prompt notice of the accident or 'loss.' Include:
>
> (1) How, when and where the 'accident' or 'loss' occurred;
>
> (2) The 'insured's' name and address; and
>
> (3) To the extent possible, the names and addresses of any injured persons and witnesses."

The policy also provides on page 9 of Section V-GARAGE CONDITIONS:

"5. TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US If any person or organization to or for whom we make payment under this Coverage Form has rights to recover damages from another, those rights are transferred to us. That person or organization must do everything necessary to secure our rights and must do nothing after 'accident' or 'loss' to impair them."

The Standard of Fed.R.Civ.P. 56 Motion for Summary Judgment

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Windon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

> "The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the moving party can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. Norton v. Liddel, 620 F.2d

1375, 1381 (10th Cir. 1980).

Committee for the First Amendment v. Campbell, 962 F.2d 1517 (10th Cir. 1992), concerning summary judgment states:

> "Summary judgment is appropriate if 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.' . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination. . . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be 'merely colorable' or anything short of 'significantly probative.' . . .
>
> "A movant is not required to provide evidence negating an opponent's claim. . . . Rather, the burden is on the nonmovant, who 'must present affirmative evidence in order to defeat a properly supported motion for summary judgment.' . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (citations omitted). *Id.* at 1521."

Legal Analysis and Conclusions

In the case of Uptegraft v. Home Insurance Company, 662 P.2d 681 (Okla. 1983), the court stated:

> "... The uninsured motorist coverage constitutes a carrier's direct promise to the insured to pay indemnity for a specified loss. Because it is a promise by the insurer to pay its own insured, rather than a promise to its insured to pay some third party, the uninsured motorist coverage is understood, in insurance parlance, as 'first-party coverage'--much like collision, comprehensive, medical payments or personal injury protection--and not as 'third-party coverage', such as personal injury or property damage coverage of public liability insurance...."

In Uptegraft, the court held that failure of the insured to

commence an action against the uninsured tort-feasor within the two-year time limit of 12 O.S. 1981 § 95(3) does not *ipso facto* discharge the insurer from liability under its uninsured motorist coverage. In that regard the Court stated:

> "Where there is an absence of some affirmative acts or prejudicial conduct by the insured which may operate to destroy the insurer's subrogation rights, mere failure of the insured to commence an action against the uninsured tortfeasor within the two-year period of limitations will not afford a basis for invoking the Porter doctrine (Porter v. MFA Mutual Insurance Company, 643 P.2d 302 (Okla. 1982) to effect a discharge of the insurer's liability."

In Porter, the insured signed a general release of the tort-feasor which destroyed the insurer's subrogation rights.

In Uptegraft, the subject insurance policy contained a paragraph with the following clause:

> "The Company shall not be obligated to pay under this insurance if an action against the uninsured motorist is barred by the Statute of Limitations."

The Uptegraft court found that the five-year limitation period was applicable under 12 O.S. §95(1) in a suit on the written contract. Thus, the Court concluded that the clause in the uninsured motorist policy providing for no coverage if an action against the uninsured motorist is barred by Oklahoma's two-year tort statute of limitations (12 O.S. § 95(3)) is void because it is violative of 15 O.S. § 216 and Const. Art. 23, § 9. Such Oklahoma Statute and constitutional provision render void contractual language limiting a contracting party's time to enforce a contract

right which is contrary to existing law.

Thus, the question is whether the Defendant insured herein did some affirmative act or prejudicial conduct which operated to destroy the insurer's subrogation rights. In Roberts v. Mid-Continent Casualty Company, 790 P.2d 1121 (Okl.App. 1989), the court stated:

> "However, passive destruction of the uninsured motorist carrier's subrogation rights, such as allowing the statute of limitations to run on the tort before filing suit against the tort-feasor, does not negate the uninsured motorist coverage. (citing Uptegraft)."

The uncontroverted facts in the record herein establish an absence of some affirmative acts or prejudicial conduct by the insured defendant which would operate to destroy the insurer's subrogation rights. Thus, Defendant is hereby granted partial summary judgment on Plaintiff AEIC's contention that Defendant insured's failure to commence an action against the uninsured tort-feasor within the two-year time limit (12 O.S. § 95(3)) discharges the insurer from liability under said uninsured motorist coverage.

Next AEIC urges that it has been prejudiced by the failure of the insured Defendant to provide prompt notice within the two-year tort statute of limitations. The subject insurance policy provision quoted in uncontroverted fact No. 11 requires prompt notice of pertinent facts concerning any accident or loss. The Affidavit of AEIC's claim manager (Plaintiff's Exhibit B to Brief in Support of Motion for Summary Judgment) states that if timely notice of the facts of the accident were given, AEIC would have either made timely payment under the policy and commenced a timely

action against the tort-feasor or have requested the insured Reeder to commence a timely action against the tort-feasor. AEIC urges no other prejudice from the late notice other than the prejudice to its subrogation right against the tort-feasor. As stated in Independent School District No. 1 of Tulsa County v. Jackson, 608 P.2d 1153 (Okl. 1980), unless the insurer is prejudiced from the lack of notice, failure to give the insurer notice of the lawsuit will not relieve the insurer from liability for the accident. The reasoning of the above cited Uptegraft and Roberts cases establish the premise that passive conduct of the insured that destroys the uninsured motorist carrier's subrogation rights does not negate the uninsured motorist coverage. The uncontroverted facts herein establish that the Defendant insured's conduct resulted from her early good faith belief, due to counsel's advice, that she had no uninsured motorist coverage. Upon learning of the possibility of such uninsured motorist coverage, she gave prompt notice of the accident and claim which was well within the five-year limitation period for written contracts. Therefore, AEIC's motion for summary judgment regarding late notice under the subject policy is hereby overruled. The contention of the Defendant insured that the prompt notice provisions of the insurance policy are not applicable to the uninsured motorist coverage lacks merit.

Relative to the Defendant's motion for summary judgment concerning AEIC's bad faith refusal to honor coverage, same is hereby overruled. At the outset, the uncontroverted facts indicate liability under the uninsured motorist policy because of the

negligent conduct of the tort-feasor, but the amount of damages due the Defendant thereunder remains a material question of fact. Further, an insurance company has a right to urge a legitimate coverage defense, as here, without subjecting the insurer to a bad faith refusal claim. Manis v. The Hartford Fire Insurance Co., and Aetna Casualty & Surety Co., 681 P.2d 760 (Okl. 1984); McCorkle v. Great Atlantic Insurance Co., 637 P.2d 583 (Okl. 1981); and Norman Heritage v. Aetna Casualty & Surety Co., 727 F.2d 912 (10th Cir. 1984). The fact that the court has found against AEIC on its coverage defense makes it no less legitimate for purposes of an alleged bad faith refusal claim.

Finally, Defendant insured's contention that an insurance carrier has to evaluate and pay a claim within not more than ninety days is misplaced. Apparently, Defendant has borrowed the ninety days from 36 O.S. § 3629, which specifically says:

> "This provision shall not apply to uninsured motorist coverage."

In conclusion, the Defendant, Cheryl L. Reeder's motion for partial summary judgment concerning uninsured motorist coverage liability (Docket #17) is hereby sustained; Plaintiff AEIC's motion in that regard (Docket #15) is overruled; Defendant insured's motion for summary judgment concerning bad faith refusal (Docket #11) is hereby overruled, and in this regard Plaintiff AEIC's motion for summary judgment (Docket #6) is sustained as there is no such viable bad faith refusal claim herein. The parties shall comport with the following pretrial and trial schedule hereafter:

9-6-94	Motion for joinder of additional parties and/or amendment to pleadings
9-23-94	Settlement report (Include date of meeting, persons present, and prospects for settlement
10-7-94	Exchange list of all witnesses' names and addresses in writing (file of record)
10-7-94	Plaintiff's expert compliance with Fed.R.Civ.P. 26(a)(2)(A)(B)
10-14-94	Defendant's expert compliance with Fed.R.Civ.P. 26(a)(2)(A)(B)
10-28-94	Discovery cutoff (Interrogatories and Rule 34 requests 30 days in advance)
11-18-94	Hearing date and pretrial conference at 9:30 A.M.
11-25-94	Deposition, videotape, interrogatories, admissions designations (See Local Rule 30.1)
12-2-94	Counterdesignations
12-5-94	Agreed pretrial order (See Local Rule 16.2)
12-5-94	Exchange pre-marked exhibits, including demonstrative exhibits
12-9-94	Objections with brief
12-12-94	Requested Instructions, Voir dire, Trial Briefs
12-19-94	Jury trial, at 9:30 A.M.

IT IS SO ORDERED this 26th day of August, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOE ALAN DOTTRICH,
as personal representative
and administrator of the
Estate of Thelma G. Stout;
JOE ALAN DOTTRICH, individually;
and
ROBERT LEE STOUT, individually,

Plaintiffs,

vs.

HEA MANAGEMENT GROUP, INC.,
d/b/a CARE NURSING CENTER,

Defendant.

Case No. 94-C-572-K

DISMISSAL WITHOUT PREJUDICE

COME NOW THE PLAINTIFFS and hereby dismiss all claims and causes of action in the above-styled matter, without prejudice to the refiling of same.

Respectfully submitted,

GUY A. THIESSEN, OBA #13170
Inverness Park, Suite 150
2512 East 21st Street
Tulsa, Oklahoma 74114-1706
918-743-3306
Attorney for Plaintiffs

CERTIFICATE OF MAILING

The undersigned hereby certifies that a true and correct copy of the above and foregoing Dismissal Without Prejudice was mailed, postage prepaid, this 29th day of August, 1994, to:

William S. Leach, OBA #14892
Rhodes, Hieronymus, Jones,
Tucker & Gable
15 West 6th Street, Suite 2800
Tulsa, Oklahoma 74119-5430
918-582-1173
Attorney for Defendant

Gavin J. Gadberry, TBA #07563780
Underwood, Wilson, Berry,
Stein & Johnson, P.C.
P.O. Box 9158
Amarillo, Texas 79105-9158
806-376-5613
Co-Counsel for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 26 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

FRANK DANIELS,

Petitioner,

vs.

MICHAEL CODY, et al.,

Respondents.

No. 94-C-313-B

ENTERED ON DOCKET

DATE AUG 29 1994

ORDER

In this habeas corpus action, Petitioner pro se contends that he is being detained in the Oklahoma Department of Corrections although he has fully discharged his sentence. Respondents have moved to dismiss the petition for failure to exhaust state remedies. They assert that Petitioner failed to timely appeal the denial of his petition for post-conviction relief which raised the same issue as the instant petition. Petitioner objects to Respondent's motion. He argues that he never sought post-conviction relief, but rather filed a motion for a writ of habeas corpus in the District Court of Cleveland County. In the alternative, he argues that he is now barred from appealing the denial of his writ of habeas corpus and therefore, that this Court should deem his state remedies exhausted.

The Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." Coleman v. Thompson, 111 S. Ct. 2546, 2554-55 (1991). To exhaust a claim, Petitioner must have "fairly presented" that specific claim to the Oklahoma Court of Criminal Appeals. See

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Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam).

It is clear from the record in this case that Petitioner has not exhausted his state remedies. Because Petitioner failed to appeal the denial of his petition for post-conviction relief, the appellate court has not had the opportunity to address the merits of his claim. Petitioner must therefore give the court of appeals that opportunity. In the event Petitioner is not granted the relief which he seeks, he may renew his petition for a writ of habeas corpus in this Court.

As to Petitioner's initial contention that he never filed an application for post-conviction relief, the Court notes that the District Court of Cleveland County construed his request for habeas corpus relief as a petition for relief under the Post Conviction Relief Act. See Attachment to Doc. #7.

ACCORDINGLY, IT IS HEREBY ORDERED that Respondents' motion to dismiss (docket # 6) is granted and that the petition for a writ of habeas corpus is dismissed without prejudice.

IT IS SO ORDERED this 26th day of Aug., 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHARLES F. GILLE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. 90-C-468-E

JUDGMENT

Pursuant to the Order and Judgment of the Tenth Circuit entered on the 17th day of August, 1994, judgment is hereby entered in favor of DEFENDANT and against PLAINTIFF.

IT IS THEREFORE ORDERED that the Plaintiff Charles F. Gille recover nothing of the Defendant United States of America, AND this judgment shall replace the Court's judgment entered on the 31st day of August, 1993.

ORDERED this 25th day of August, 1994.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 25 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

VICTORIA WILSON,

Plaintiff,

v.

WASHINGTON NATIONAL INSURANCE COMPANY,

Defendant.

Case No. 93-C-812-E

DISMISSAL WITH PREJUDICE

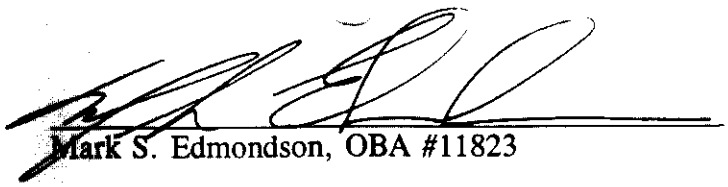
All parties in the above-styled matter agree, pursuant to Fed. R. Civ. P., Rule 41(a)(1), that this action be dismissed with prejudice and each party is to bear its own expenses and costs of litigation.

Dale Warner, OBA #9359
2512 E. 21st Street
Suite 200
Tulsa, OK 74114

ATTORNEY FOR VICTORIA WILSON, PLAINTIFF

mse\22250.801
dismissw.prj

ENTERED ON DOCKET
DATE 8-26-94



Mark S. Edmondson, OBA #11823

- Of the Firm -

CROWE & DUNLEVY
A Professional Corporation
500 Kennedy Building
321 South Boston
Tulsa, Oklahoma 74103-3313

ATTORNEYS FOR WASHINGTON NATIONAL INSURANCE COMPANY, DEFENDANT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KENNETH BALMER,

Defendant.

No. 91-CR-134-B
(94-C-308-B)

ORDER

In the present motion to vacate set aside or correct sentence pursuant to 28 U.S.C. § 2255, Defendant argues that this Court abused its discretion in sentencing him to a "consecutive" term of imprisonment. The Government has raised the defense of procedural default. For the reasons stated below the Court concludes that Defendant's motion should be denied as procedurally barred.

On April 16, 1993, Defendant pleaded guilty to two counts of possessing a firearm after prior felony conviction, 18 U.S.C. § 922(g)(1), with the remaining three counts dismissed pursuant to a plea agreement. On June 4, 1993, this Court sentenced the Defendant to a term of 18 months on Counts One and Three to run concurrent. This Court ordered, however, that nine months of that term shall run concurrently to California Case No. SCR-56713, and that the remaining nine months should be served consecutively with Case No. SCR-56713. The Defendant did not file a direct appeal.

I. ANALYSIS

It is well settled that a section 2255 motion is not available to test the legality of matters which should have been raised on

direct appeal. United States v. Cook, 997 F.2d 1312, 1320 (10th Cir. 1993). A defendant's failure to present an issue on direct criminal appeal bars him from raising the issue in his section 2255 motion, unless he can show cause excusing his procedural default and actual prejudice resulting from the errors of which he complains, or can show that a fundamental miscarriage of justice will occur if his claim is not addressed. Id. To establish cause, there must be a showing of some external impediment preventing a claim from being raised. See Murray v. Carrier, 477 U.S. 478, 492 (1986). Ignorance or inadvertence does not constitute cause, nor does failure to recognize the factual or legal basis for a claim. Id. at 486-87.

In the instant case, the Defendant has neither appealed his conviction nor shown cause or prejudice for failing to do so. Therefore, the Court concludes that Defendant is now procedurally barred from raising his sentencing issue in this section 2255 motion.

ACCORDINGLY, IT IS HEREBY ORDERED that Defendant's motion to vacate, set aside, or correct sentence (doc. #12) is denied.

SO ORDERED THIS 25 day of Aug., 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SINCLAIR OIL CORPORATION, a Wyoming corporation,

Plaintiff,

v.

WILLIAM R. THOMAS, d/b/a SINCLAIR GAS MARKETING CO. and SINCLAIR OIL & GAS COMPANY,

Defendant.

Case No. 94-C-795-K

PRELIMINARY INJUNCTION ORDER

Plaintiff Sinclair Oil Corporation ("Sinclair") seeks preliminary injunctive relief enjoining the Defendant William R. Thomas ("Thomas"), or his agents, officers, employees, servants, or anyone in active concert or participation with him, from using the name "Sinclair" in the conduct of any business related in any way to the oil and natural gas industry, from continuing to compete unfairly with Sinclair, and from infringing on Sinclair's servicemarks and trademarks. Having reviewed the pleadings and affidavits filed with the Court, having heard the evidence submitted at the hearing held August 25, 1994, and having heard argument of counsel, in order to preserve the status quo until the issues can be heard at trial, the Court enters the following Preliminary Injunction:

I. FINDINGS OF FACT

1. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1332, and 1338, and 15 U.S.C. §§ 1116, 1121.

2. In November, 1990, Thomas began to market and sell natural gas under the name "Sinclair Gas Marketing Co." and/or "Sinclair Oil & Gas Company."

3. Thomas intended to use the "Sinclair" names in conjunction with the marketing and sale of natural gas in, at a minimum, the States of Texas, Oklahoma, and Louisiana.

4. Sinclair has been, and now is, extensively engaged in the business of the production, gathering, transmission, sale, and marketing of natural gas in interstate commerce under various servicemarks, trademarks and registered names, including, but not limited to: "Sinclair Oil Corporation;" "Sinclair Marketing Company;" "Sinclair Oil and Gas Company;" "Sinclair Refining Company;" "Sinclair Pipeline Company;" and "Sinclair Trucking Company." Sinclair conducts business under the "Sinclair" name throughout the United States, including Oklahoma, Texas, and Louisiana, as well as internationally. Sinclair is the exclusive owner of all such service and trademarks, which have become, through widespread and favorable public acceptance and recognition, an asset of substantial value to Sinclair.

5. On January 26, 1960; March 29, 1960; April 5, 1960; March 7, 1961; April 18, 1967; June 3, 1969; and March 11, 1975, the United States Patent and Trademark Office granted Federal Trade Registrations to Sinclair for the servicemark or trademark "Sinclair" when used in conjunction with the production, gathering, transmission, sale, and marketing of natural gas and oil, as Registration Nos. 691,904; 691,905; 695,176; 695,468; 712,302; 827,609; 870,641; 1,006,206 and 1,006,485. These Registrations are

in full force and effect, are owned by Sinclair, and have become incontestable pursuant to 15 U.S.C. § 1065.

6. In July, 1994, Sinclair discovered that Thomas was conducting business in the natural gas industry in at least the States of Oklahoma, Texas, and Louisiana and is, without authorization from Sinclair, continuing to use Sinclair's registered servicemarks and trademarks in the conduct of his business.

7. Notwithstanding Sinclair's well-known and prior common law and statutory rights in the servicemark and trademark "Sinclair," Thomas adopted and used the mark "Sinclair" in at least Oklahoma, Texas, and Louisiana and in interstate commerce in conjunction with a gas marketing business.

8. Thomas' use of the name "Sinclair" in his gas marketing business has caused, and is likely to continue to cause, confusion in the public and particularly in the natural gas industry.

9. Sinclair's servicemark and trademark "Sinclair" has become uniquely associated with and identifies Sinclair. Thomas' interstate use of the designation "Sinclair" is a use of a false designation of origin, or a false representation, wrongly and falsely designating Thomas' goods and/or services as originating from or connected with Sinclair, and constitutes utilizing false descriptions or representations in interstate commerce. Moreover, such unauthorized use of the name "Sinclair" causes a likelihood of confusion, deception, and mistake.

10. Thomas' use in commerce of the designation "Sinclair" in conjunction with his business in the natural gas industry is an

infringement of Sinclair's registered servicemarks and trademarks in violation of 15 U.S.C. §§ 1114, 1125.

11. The aforementioned acts of infringement have irreparably damaged Sinclair and will continue to cause further actual and irreparable injury to Sinclair if Thomas is not preliminarily enjoined by this Court from further violation of Sinclair's rights, pursuant to 15 U.S.C. § 1116.

12. Sinclair has established by the evidence presented to this Court that Sinclair has a substantial likelihood of success on the merits.

13. Sinclair has established irreparable injury to Sinclair if Defendant continues to use the "Sinclair" name in his operation of a natural gas marketing business.

14. The threatened injury to Sinclair outweighs any damage that might result to Defendant through the issuance of a permanent injunction.

15. It would not be adverse to the public interest to grant a preliminary injunction. Further, a balancing of equities favors the issuance of permanent injunctive relief in order to avoid continued confusion to, and deception upon, the public.

16. Sinclair filed this action on August 17, 1994. Service on Thomas was obtained on August 25, 1994.

17. With respect to the hearing held on August 25, 1994, Thomas received the following notice:

> (a) On August 17, 1994, the Court transmitted to Thomas at his Texarkana, Texas address, the Order setting the August 25 hearing and advising Thomas that he was to

respond to Sinclair's request for injunctive relief on August 24, 1994.

(b) On August 17, 1994, the Court requested that Sinclair's counsel transmit all filed papers to Thomas. Sinclair complied with the request by transmitting on August 17, 1994, all pleadings filed in the case by Federal Express with delivery on August 18, 1994.

(c) On August 19, 1994, an attorney in Texarkana, claiming to be acting on behalf of Thomas, contacted Sinclair's counsel and was advised of the August 25 hearing. Sinclair's counsel had daily contact with this attorney through August 24, 1994.

(d) Thomas did not respond to Sinclair's request for injunctive relief on August 24 as ordered by the Court and has filed nothing on his behalf. No appearance of counsel has been made.

(e) Neither Thomas, nor anyone on his behalf, appeared for the hearing.

(f) Thomas' Texarkana office was contacted at 10:00 a.m. on August 25, 1994 by the Court's Courtroom Deputy, who was advised that Thomas was still in Texarkana.

The Court finds that Thomas received sufficient notice of the August 25, 1994, hearing.

II. CONCLUSIONS OF LAW

18. This Court may properly exercise personal and subject matter jurisdiction over the parties to this action pursuant to 28 U.S.C. §§ 1331, 1332 and 1338 and 15 U.S.C. §§ 1116, 1121.

19. Sinclair has demonstrated the four prerequisites to the granting of preliminary injunctive relief. Specifically:

(a) Sinclair enjoys a likelihood that it will ultimately prevail on the merits of its claims;

(b) that there exists a substantial threat that Sinclair will suffer irreparable injury if the requested preliminary injunction is not granted;

(c) the threatened injury to Sinclair outweighs any threatened harm that the requested preliminary injunction may have on the Defendant; and

(d) that the public's interest will not be harmed by the issuance of the requested preliminary injunction.

Otero Savings and Loan Association v. Federal Reserve Bank of Kansas City, Missouri, 665 F.2d 275 (10th Cir. 1981). Sinclair is, therefore, entitled to a grant of the requested preliminary injunction.

20. Thomas, his officers, agents, servants, employees, attorneys, and all persons in active concert or participation with him, are preliminarily enjoined and restrained from:

(a) using the service or trademark "Sinclair" or any confusingly similar designation, alone or in combination with other words, as a servicemark, trademark, or tradename component or otherwise, to produce, gather, transmit, sell, or market natural gas or natural gas products;

(b) using the name "Sinclair" in conjunction with any name under which Thomas is doing business;

(c) otherwise infringing Sinclair's service and trademarks;

(d) unfairly competing with Sinclair in any manner whatsoever; and

(e) causing likelihood of confusion, injury to business reputation, or dilution of the distinctiveness and value of Sinclair's name, symbols, marks, or forms of advertisement.

21. The Court has considered the necessity of the posting of security pursuant to Rule 65(c) of the Federal Rules of Civil Procedure and finds, in its discretion, that a bond from the Plaintiff in the amount of $5,000.00 is appropriate and sufficient. Such bond shall be posted by Plaintiff within twenty (20) days from the date of this Order. See Conquina Oil Corp. v. Transwestern Pipeline Co., 825 F.2d 1461 (10th Cir. 1987); Continental Oil Co. v. Frontier Refining Co., 338 F.2d 780 (10th Cir. 1964).

22. The Court hereby enters that following Case Management Scheduling Order:

9-15-94	Motion for joinder of additional parties and/or amendment to pleadings
9-30-94	Exchange list of all witnesses' names and addresses in writing (file of record)
11-4-94	Discovery cutoff (Interrogatories and Rule 34 requests 30 days in advance)
11-10-94	Dispositive motions and motion in limine cutoff (See Local Rule 56.1 and 7.1E)
11-23-94	Responses
11-30-94	Replies
12-9-94	Hearing date and pretrial conference - 3:30 p.m.
12-~~16~~ 5 -94	Agreed pretrial order (See Local Rule 16.2)
12-16-94	Exchange pre-marked exhibits, including demonstrative exhibits
12-19-94	Settlement conference (Approximate desired date-- Separate application to continue required)
12-23-94	Deposition, videotape, interrogatories, admissions designations (See Local Rule 30.1I)
12-23-94	File Consent to Magistrate Judge if agreed upon by parties (See Local Rule 72.1A(1)
12-29-94	Counterdesignations

1-4-95 Objections with brief

1-9-95 Requested instructions, Findings of Fact and Conclusions of Law (if nonjury), Voir dire, Trial Briefs

1-17-95 Trial Date at 9:30 a.m.

IT IS THEREFORE ORDERED that a Preliminary Injunction as set forth herein be entered in the above-styled case at this time. The purpose of the Court's granting said Preliminary Injunction is to preserve the status quo until a full hearing on the issues can be heard at trial.

SO ORDERED, this 25th day of August, 1994.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
DEWEY R. TALLANT a/k/a DEWEY RICHARD TALLANT; KERRY N. ROBERTSON; JUDY A. ROBERTSON; STATE OF OKLAHOMA ex rel. OKLAHOMA TAX COMMISSION; COUNTY TREASURER, Rogers County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma,	)	ENT[illegible]
	)	DAT[illegible]
	)	
Defendants.	)	CIVIL ACTION NO. 94-C-94-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 25 day of Aug., 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney; the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, appears by Kim D. Ashley, Assistant General Counsel; the Defendants, County Treasurer, Rogers County, Oklahoma, and Board of County Commissioners, Rogers County, Oklahoma, appear not, having previously claimed no right, title or interest in the subject property; and the Defendants, Dewey R. Tallant aka Dewey Richard Tallant; Kerry N. Robertson; and Judy A. Robertson, appear not, but make default.

The Court, being fully advised and having examined the court file, finds that the Defendant, Kerry N. Robertson, was served with Summons and Complaint on April 29, 1994; that the Defendant, Judy A. Robertson, was served with Summons and

Complaint on April 29, 1994; that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, acknowledged receipt of Summons and Complaint on February 7, 1994; that the Defendant, County Treasurer, Rogers County, Oklahoma, acknowledged receipt of Summons and Complaint on February 10, 1994; and that the Defendant, Board of County Commissioners, Rogers County, Oklahoma, acknowledged receipt of Summons and Complaint on February 4, 1994.

The Court further finds that the Defendant, Dewey R. Tallant aka Dewey Richard Tallant, was served by publishing notice of this action in the Claremore Daily Progress, a newspaper of general circulation in Rogers County, Oklahoma, once a week for six (6) consecutive weeks beginning May 15, 1994, and continuing to June 19, 1994, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, Dewey R. Tallant aka Dewey Richard Tallant, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, Dewey R. Tallant aka Dewey Richard Tallant. The Court conducted an inquiry into the

sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting on behalf of the Secretary of Veterans Affairs, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to his present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, County Treasurer, Rogers County, Oklahoma, and Board of County Commissioners, Rogers County, Oklahoma, filed their Answer on February 18, 1994, claiming no right, title or interest in the subject property; that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, filed its Answer on February 28, 1994; and that the Defendants, Dewey R. Tallant aka Dewey Richard Tallant, Kerry N. Robertson, and Judy A. Robertson, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real

property located in Rogers County, Oklahoma, within the Northern Judicial District of Oklahoma:

> The N 1/2 of Lot 1 in Block 2 of SUNNY ACRES II, a Subdivision in Section 11, Township 21 North, Range 17 East of the IB&M, Rogers County, Oklahoma, according to the recorded Plat thereof.

The Court further finds that on October 19, 1983, Nelson R. Kymes and Nancy J. Kymes, husband and wife, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, their mortgage note in the amount of $45,000.00, payable in monthly installments, with interest thereon at the rate of 12.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, Nelson R. Kymes and Nancy J. Kymes, husband and wife, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a mortgage dated October 19, 1983, covering the above-described property. Said mortgage was recorded on October 20, 1983, in Book 660, Page 68, in the records of Rogers County, Oklahoma.

The Court further finds that on February 15, 1984, the Administrator of Veterans Affairs assigned the mortgage regarding the above-described real property to Merrill Lynch Mortgage Corporation, which mortgage was recorded on March 26, 1984 in Book 671, Page 852 in the records of Rogers County, Oklahoma.

The Court further finds that on May 29, 1991, Nelson R. Kymes and Nancy J. Kymes, husband and wife, executed a General

Warranty Deed regarding the above-described real property to Kerry N. Robertson, a single person, which deed was recorded on May 29, 1991 in Book 855, Page 156 in the records of Rogers County, Oklahoma.

The Court further finds that on June 26, 1992, Kerry N. Robertson and Judy A. Robertson, husband and wife, executed a Warranty Deed regarding the above-described real property to Dewey (Richard) Tallant, a single person, which deed was recorded on June 26, 1992 in Book 885, Page 341 in the records of Rogers County, Oklahoma. This deed is defective in that the Notary's Commission had expired before the date of acknowledgment.

The Court further finds that on May 18, 1993, Glenfed Mortgage Corporation fka Merrill Lynch Mortgage Corporation, assigned the mortgage to the Secretary of Veterans Affairs, which mortgage was recorded on June 17, 1993 in Book 919, Page 9 in the records of Rogers County, Oklahoma. A corrected Assignment of Mortgage was recorded on January 28, 1994 in Book 944, Page 543 in the records of Rogers County, Oklahoma.

The Court further finds that the Defendant, Dewey R. Tallant aka Dewey Richard Tallant, made default under the terms of the aforesaid note and mortgage by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, Dewey R. Tallant aka Dewey Richard Tallant, is indebted to the Plaintiff in the principal sum of $42,719.18, plus interest at the rate of 12.5 percent per annum from January 1, 1993 until judgment, plus interest thereafter at the legal rate until fully paid, and the

costs of this action in the amount of $269.48 ($20.28 fees for service of Summons and Complaint, $241.20 publication fees, $8.00 fee for recording Notice of Lis Pendens).

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Rogers County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that the Defendants, Dewey R. Tallant aka Dewey Richard Tallant, Kerry N. Robertson, and Judy A. Robertson, are in default and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, has a lien on the property which is the subject matter of this action by virtue of Warrant No. ITI9202163800 dated November 12, 1992 and filed November 24, 1992 in the amount of $1,295.59 plus costs, penalties and interest. Said lien is inferior to the interest of the Plaintiff, United States of America.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment in rem against the Defendant, Dewey R. Tallant aka Dewey Richard Tallant, in the principal sum of $42,719.18, plus interest at the rate of 12.5 percent per annum from January 1, 1993 until judgment, plus interest thereafter at the current legal rate of 5.67 percent per annum until paid, plus the costs of this action in the amount of $269.48 ($20.28 fees for service of Summons and Complaint, $241.20 publication fees, $8.00 fee for recording Notice of

Lis Pendens) plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Dewey R. Tallant aka Dewey Richard Tallant; Kerry N. Robertson; Judy A. Robertson; and County Treasurer and Board of County Commissioners, Rogers County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, have and recover in rem judgment in the amount of $1,295.59 plus costs, penalties and interest.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell, according to Plaintiff's election with or without appraisement, the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of the judgment of Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, in the amount of $1,295.59 plus costs, penalties and interest.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

UNITED STATES DISTRICT JUDGE

APPROVED:
STEPHEN C. LEWIS
United States Attorney

PETER BERNHARDT, OBA #741
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

KIM D. ASHLEY, OBA #14175
Assistant General Counsel
Attorney for Defendant,
State of Oklahoma ex rel.
Oklahoma Tax Commission

Judgment of Foreclosure
USA v. Dewey R. Tallant, et al.
Civil Action No. 94-C-94-B

PB/esf

RV

2-29

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE AUG 26 1994

JOSEPH J. GARBER,

Plaintiff,

vs.

DEWEY "BUCK" JOHNSON, individually and as Sheriff of Rogers County, Oklahoma, and the BOARD OF COUNTY COMMISSIONERS OF ROGERS COUNTY, OKLAHOMA,

Defendants.

Case No. 93-C-~~1~~ 574-BU

FILED
AUG 26 1994
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT

This cause was heard before the Honorable Michael Burrage, District Judge, and a jury, at the United States District Court for the Northern District of Oklahoma, and the Court, having granted defendant's Rule 50 motion as to the due process issues at the conclusion of the plaintiff's evidence, and the court having submitted issues to the jury, and the jury having answered, finding liability issues for the plaintiff and against the defendant on the issues of First Amendment (freedom of speech and freedom of association) and upon the state law claim for wrongful discharge in violation of public policy, and the jury having fixed plaintiff's damages as "zero", and the plaintiff having objected to the receipt of the jury verdict as to damages and the Court, having overruled that objection.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the defendant be and he is hereby granted judgment against the plaintiff on the due process issues, together with costs of this action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the court that the plaintiff be and he is hereby granted judgment against the defendant on the issues of First Amendment (freedom of speech and freedom of association) and the state law claim of wrongful discharge in violation of public and is awarded "zero" damages, together with the costs of this

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action.

The court reserves the issues of attorney fees pending the timely finding of appropriate motions therefor.

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

STEVEN W. VINCENT, OBA #9237
Attorney for Plaintiff

DANIEL S. SULLIVAN, OBA #12887
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 25 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

BARBRA L. MALOY and PATRICK MALOY,

Plaintiffs,

v.

ANDY FRAIN AVIATION SERVICES, INC.

Defendant.

94-C-564-B

ENTERED ON DOCKET

DATE AUG 26 1994

ORDER ALLOWING DISMISSAL WITH PREJUDICE

This matter came on before the Court this 25 day of August, 1994, upon the parties' Joint Stipulation of Dismissal With Prejudice, and for good cause shown, it is therefore

ORDERED, ADJUDGED AND DECREED, that Plaintiffs' action against this Defendant is hereby dismissed with prejudice with each of the parties to bear their own costs and attorneys' fees.

S/ [illegible]

UNITED STATES DISTRICT JUDGE

SAB-2116

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STEVE LENNOX,)
)
Plaintiff,)
)
vs.) No. 93-C-270-B
)
RON CHAMPION, et al.,)
)
Defendants.)

ORDER

At issue before the Court in this prisoner's civil rights action are Plaintiff's claims that Defendants disciplined him and transferred him to a maximum security prison in violation of the Due Process Clause. Defendants have moved to dismiss or in the alternative for summary judgment. Plaintiff has objected to Defendants' motion. For the reasons stated below, the Court concludes that Defendants' motion to dismiss should be denied and that their motion for summary judgment should be granted.

I. BACKGROUND

On April 17, 1992, Plaintiff, an inmate at R.B. "Dick" Connor Correctional Center (DCCC), was charged with the offense of "Menancing," violation code 05-5. The Offense report stated that on April 16, 1992, Debbie Bowers entered Plaintiff's cell checking for extra toilet paper and that Plaintiff told her that she was not allowed in his cell to search it and if she did that "he would whip [her] mother f_____ ass." The incident was witnessed by case manager Judy Anderson who also provided a statement. The charge

against Plaintiff was investigated and following a disciplinary hearing on April 21, 1992, Plaintiff was found guilty of menacing a prison officer, convicted to thirty days of punitive segregation, and fined $15.00. On April 22, 1992, Warden Champion affirmed the disciplinary action.

As a result of the menancing charge, Plaintiff's security points increased to twenty-three which is within the maximum security level range. On April 23, 1992, DCCC recommended that Plaintiff be transferred to a maximum security level facility. The population office concurred with DCCC's recommendation and approved a transfer for Plaintiff to Oklahoma State Penitentiary (OSP). On May 1, 1992, Plaintiff was transferred to OSP.

In March 1993, Plaintiff brought this pro se civil rights action under 42 U.S.C. § 1983 against Ron Champion, Warden of the (DCCC), and Debbie Bowers, Steve Maxwell, and Odis Sweeden, employees of DCCC, for due process violations in connection with the April 21, 1992 disciplinary and the May 1, 1992 transfer from DCCC to OSP. Plaintiff alleged that the disciplinary hearing did not comply with the minimum requirement of procedural due process because Plaintiff was not given advance written notice of the claimed violation and was not provided a written statement of the evidence relied upon and of the reasons for the disciplinary action. He contended that "no reason [was] given for why the reports were found to be more credible than the denial of [the Plaintiff." As to the transfer to OSP, Plaintiff alleged that the transfer violated his due process rights because it was not

contemplated in the punishment for the menancing charge. Plaintiff sought the expunction of the disciplinary charge from his prison record and actual and punitive damages. (Doc. #1.)

In December 1993, Defendants moved to dismiss or in the alternative for summary judgment. They argued that Plaintiff was not denied due process in his disciplinary hearing or in his transfer to OSP. In the alternative, they argued that they are entitled to qualified immunity. (Doc. #6.) The Plaintiff objected to Defendants' motion, contending for the first time that Defendants violated his due process rights because the disciplinary hearing was held before a single hearing officer. He further contended that his transfer to OSP was nothing but additional punishment for the disciplinary violation.[1] (Doc. #10.)

II. ANALYSIS

A. Dismissal for Failure to State a Claim

Title 42 U.S.C. § 1983 provides individuals a federal remedy for deprivation of their rights secured by the Constitution and laws of the United States. See Dixon v. City of Lawton, 898 F.2d

[1]The Court need not address Plaintiff's claims raised for the first time in his response (that the presence of a single hearing officer rather than a tribunal violated his due process rights and that Defendants failed to transfer him to a medium security facility as soon as he qualified for medium custody) because the Plaintiff failed to allege those issue in his original complaint. Although Plaintiff moved to amend his complaint to add the first claim he failed to submit a proposed amended complaint as required by Local Rule 9.3.C. and the Court denied his motion on June 27, 1994. (Doc. #14.) As to the second claim, the Court notes, that this issue is now moot because at least as of March 4, 1994, Plaintiff was transferred to James Crabtree Correctional Center, a medium security prison.

1443, 1447 (10th Cir. 1990). For a complaint under section 1983 to be sufficient a plaintiff must allege two prima facie elements: that defendant deprived him of a right secured by the Constitution and laws of the United States,[2] and that defendant acted under color of law.[3] *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150 (1970). Federal Rule of Civil Procedure 8(a) sets up a liberal system of notice pleading in federal courts. This rule requires only that the complaint include a short and plain statement of the claim sufficient to give the defendant fair notice of the grounds on which it rests. *Leatherman v. Tarrant Cty. Narcotics Unit*, 113 S.Ct. 1160, 1163 (1993) (rejecting heightened pleading requirements in civil rights cases against local governments). If plaintiff's complaint demonstrates both substantive elements it is sufficient to state a claim under section 1983. Id.; Meade v. Grubbs, 841 F.2d 1512, 1526 (10th Cir. 1988).

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[2]The rights set forth in the Bill of Rights are held exclusively by the states, secured from infringement by the federal government. Flagg Bros. v. Brooks, 436 U.S. 149 (1978). Therefore, constitutional civil rights claims of individuals apply to the states only through the Fourteenth Amendment and require state action to afford relief under section 1983. See Monroe v. Pape, 365 U.S. 167 (1961), overruled on other grounds, Monell v. Dept. of Social Services, 436 U.S. 658 (1978). The state action test requires: (1) that the deprivation be caused by the exercise of a right or privilege created by the state or by a person for whom the state is responsible, and (2) that the actor must be someone who is a state actor. Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982). A state official, such as a sheriff, clearly meets this test. Cf. id.

[3]There is an overlap between the state action requirement under the Fourteenth Amendment and action under color of law. See Lugar, 457 U.S. at 926. Where the plaintiff has already demonstrated state action under the first element the necessity to show action under color of law is also satisfied.

A court should dismiss a constitutional civil rights claim only if it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. Meade, 841 F.2d at 1512 (citing Owens v. Rush, 654 F.2d 1370, 1378-79 (10th Cir. 1981)). For purposes of reviewing a complaint for failure to state a claim, all allegations in the complaint are presumed true and construed in a light most favorable to plaintiff. Id.; Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). Furthermore, pro se complaints are held to less stringent standards than pleadings drafted by lawyers and the court must construe them liberally. Haines v. Kerner, 404 U.S. 519, 520 (1972).

After viewing the allegations in the complaint in the light most favorable to the Plaintiff, the court concludes that Plaintiff has sufficiently stated claims as to deprivations of his Fourteenth Amendment rights to avoid dismissal under Rule 12(b)(6). Plaintiff's complaint specifically alleges deprivations of his Fourteenth Amendment rights supported by sufficient facts alleged to have deprived him of those rights. Furthermore, Plaintiff has attributed these deprivations to Defendants acting under color of law through their capacities as employees of DCCC. Therefore, construing Plaintiff's complaint liberally in accord with his pro se status, the Court concludes that Plaintiff has sufficiently stated a claim upon which relief can be granted for deprivation of his Fourteenth Amendment rights. Defendant's motion to dismiss for failure to state a claim is accordingly denied.

B. Summary Judgment

1. Standard

The court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party. Applied Genetics Int'l., Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990). "However, the nonmoving party may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." Id. The court cannot resolve material factual disputes at summary judgment based on conflicting affidavits. Hall v. Bellmon, 935 F.2d 1106, 1111 (10th Cir. 1991). However, the mere existence of an alleged factual dispute does not defeat an otherwise properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Only material factual disputes preclude summary judgment; immaterial disputes are irrelevant. Hall, 935 F.2d at 1111. Similarly, affidavits must be based on personal knowledge and set forth facts that would be admissible in evidence. Id. Conclusory or self-serving affidavits are not sufficient. Id. If the evidence, viewed in the light most favorable to the nonmovant, fails to show that there exists a

genuine issue of material fact, the moving party is entitled to judgment as a matter of law. See Anderson, 477 U.S. at 250.

Where a pro se plaintiff is a prisoner, a court authorized "Martinez Report" (Report) prepared by prison officials may be necessary to aid the court in determining possible legal bases for relief for unartfully drawn complaints. See Hall, 935 F.2d at 1109. The court may treat the Martinez Report as an affidavit in support of a motion for summary judgment, but may not accept the factual findings of the report if the plaintiff has presented conflicting evidence. Id. at 1111. The plaintiff's complaint may also be treated as an affidavit if it is sworn under penalty of perjury and states facts based on personal knowledge. Id. The court must also construe plaintiff's pro se pleadings liberally for purposes of summary judgment. Haines v. Kerner, 404 U.S. 519, 520 (1972). When reviewing a motion for summary judgment it is not the judge's function to weigh the evidence and determine the truth of the matter but only to determine whether there is a genuine issue for trial. Anderson, 477 U.S. at 249.

2. Analysis

In considering Defendants' motion for summary judgment, the court has viewed the Report and Plaintiff's complaint as affidavits. Although Plaintiff has responded to the motion for summary judgment, he has not refuted the facts in Defendants' motion and Report. Accordingly, because Plaintiff has not presented conflicting evidence, the court accepts the factual

findings of the report. See Hall, 935 F.2d at 1111.

a. Disciplinary Hearing

A court's review of a prison disciplinary hearing, even when it results in the loss of good time credit and administrative segregation, is quite limited. Due process requires advance notice of the charges, the right to call witnesses and present evidence if doing so does not jeopardize institutional safety or correction goals, and a written statement of the evidence relied on and the reasons for the disciplinary action. Wolff v. McDonnell, 418 U.S. 539, 566 (1974). Once an inmate receives this due process, the Supreme Court has instructed in Superintendent, Mass. Correctional Inst. v. Hill, 472 U.S. 445, 454-55 (1985), that the findings of the prison disciplinary board need only be supported by "some evidence in the record."

Plaintiff alleges that he was not provided the initial due process required by Wolff and that he was given no explanation why the statements of Defendant Bowers and witness Anderson were found more credible than his statement which denied Ms. Bower's allegations altogether. The Court will address first whether Plaintiff was provided the initial due process and second whether the decision of the disciplinary board was supported by "some evidence in the record."

After carefully reviewing Plaintiff's complaint, the Special Report, and Plaintiff's response, the Court concludes that Plaintiff was provided all the process that was due him.

Plaintiff's signature on the offense report indicates that Plaintiff received copies of the written charges against him as well as the evidence against him on April 17, 1992. (Doc. #7 ex. B at 1.) The Investigative Report, which also carried Plaintiff's signature, indicates Plaintiff had no witnesses to present and did not desire the assistance of a staff representative. (Id. ex. B at 2.) Lastly, the Disciplinary Hearing Actions form set out the basis for the punishment imposed. (Id. ex. B at 4.)

Although Plaintiff contends that "no reason [was] given for why the reports were found to be more credible than the denial of [the Plaintiff]," the Court concludes that "some evidence" existed to support the conclusion of the disciplinary board that plaintiff was guilty of menacing. The "some evidence" standard does not require proof with certainty, proof beyond a reasonable doubt, or even proof by a preponderance of the evidence. All that is necessary is "any evidence in the record that could support the conclusion reached by the disciplinary board." Hill, 472 U.S. at 456. Accordingly, the Court concludes that there remain no genuine issues of material fact and that Defendants are entitled to judgment as a matter of law on Plaintiff's claim regarding the disciplinary hearing.

b. Transfer

Plaintiff's complaint about his reclassification and regressive transfer must also fail. Plaintiff has no constitutional right to be incarcerated in a particular cell or

facility, and his transfer from DCCC to OSP, in and of itself, does not implicate a constitutional right of Plaintiff. See Olim v. Wakinekona, 461 U.S. 238, 245 (1983); Meachum v. Fano, 427 U.S. 215, 224 (1976); Moody v. Dagget, 429 U.S. 78, 88 n.9 (1976). Thus, any expectation Plaintiff may have had in remaining at DCCC and later in being considered for lower custody level is too insubstantial to rise to the level of a due process protection. See Meachum, 427 U.S. at 228; Kincaid v. Duckworth, 689 F.2d 702, 704 (7th Cir. 1982), cert. denied, 461 U.S. 946 (1983); see also Ruark v. Solano, 928 F.2d 947, 949 (10th Cir. 1991) (because an inmate has no right to confinement in a particular institution, "[h]e cannot complain of deprivation of his 'right' in violation of due process"). Additionally, federal courts do not interfere in classification and placement decisions. Such decisions are entrusted to prison administrators, not to the federal courts. Moody, 429 U.S. at 88 n.9; Meachum, 427 U.S. at 228; Wilkerson v. Maggio, 703 F.2d 909, 911 (5th Cir. 1983). Accordingly, Defendants are entitled to judgment as a matter of law on this claim as well.

III. CONCLUSION

After viewing the evidence in the light most favorable to the Plaintiff, the Court concludes that Defendants have made an initial showing negating all disputed material facts, that Plaintiff has failed to controvert Defendants' summary judgment evidence, and that Defendants are entitled to judgement as a matter of law. **ACCORDINGLY, IT IS HEREBY ORDERED**, that Defendants' motion to

dismiss (doc. #6-1) is denied and that their motion for summary judgment (doc. #6-2) is granted.

SO ORDERED THIS 25 day of Aug., 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DWIGHT BOOKER,

Plaintiff,

vs.

RONALD J. CHAMPION,

Defendants.

No. 94-C-590-B

ORDER

Before the Court is Defendants' motion to dismiss for failure to exhaust state remedies filed on July 1, 1994. Plaintiff has not responded.

Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) Defendants' motion to dismiss [docket #4] is granted and the above captioned case is dismissed without prejudice at this time.

SO ORDERED THIS 25 day of Aug, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STEVE LENNOX,

Plaintiff,

vs.

No. 93-C-270-B

RON CHAMPION, et al.,

Defendants.

JUDGMENT

In accord with the Order granting Defendants' motion for summary judgment, the Court hereby enters judgment in favor of all Defendants and against the Plaintiff, Steve Lennox. Plaintiff shall take nothing on his claim. Each side is to pay its respective attorney fees.

SO ORDERED THIS 25 day of Aug, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAM R. JOHNSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Case No. 94-C-266-BU

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 60 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 24th day of August, 1994.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JODY LEE SMITH,

Plaintiff,

vs.

HENRY TURNER, et al.,

Defendants.

No. 93-C-595-K

ORDER

Before the Court for consideration are Defendants' motion to dismiss which the Court has construed as a motion for summary judgment, and Defendants' motion for a protective order [docket #10 and #13].

On June 23, 1994, the Court granted Plaintiff a second opportunity to controvert Defendants' motion for summary judgment by submitting counter-affidavits or other responsive material and cautioned him that his failure to respond may result in the entry of summary judgment against him. Hall v. Belmon, 935 F.2d 1106, 1109 (10th Cir. 1991). The Plaintiff has failed to respond.

Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C. Therefore, Defendants' motion for summary judgment should be granted.

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) Defendants' motion to dismiss (construed as a motion for summary judgment) (doc. #10) is granted;

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(2) Judgment is hereby entered in favor of Defendants and against the Plaintiff; and

(3) Defendants' motion for a protective order (doc. #13) is denied as moot.

SO ORDERED THIS 24 day of August, 1994.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERT C. TAFT, a citizen of the State of Washington,

Plaintiff,

vs.

BANK IV OKLAHOMA, a national banking association, successor in interest to Fourth National Bank of Tulsa; NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, a Wisconsin corporation; A CERTAIN SUM OF $150,000 in the custody of Northwestern Mutual Life Insurance Company; EDWARD H. BRETT, Individually; EDWARD H. BRETT, Personal Representative of The Estate of Mary Evelyn Brett, Deceased; and IMAGE PUBLISHING, INC., an Oklahoma corporation,

Defendants.

Case No. 93-C-932-EBe

ORDER OF DISMISSAL

This matter comes on for hearing on the joint Stipulation of the Plaintiff, Robert C. Taft, and Defendant, Northwestern Mutual Life Insurance Company, for a dismissal with prejudice of the above captioned cause against Defendant, Northwestern Mutual Life Insurance Company. The Court, being fully advised, having reviewed the Stipulation, finds that the above entitled cause should be dismissed with prejudice to the filing of a future action as to Defendant, Northwestern Mutual Life Insurance Company, pursuant to said Stipulation.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the above entitled cause against Defendant, Northwestern Mutual Life Insurance Company, be and

is hereby dismissed with prejudice to the filing of a future action against said Defendant, the parties to bear their own respective costs.

Dated this 24th day of ~~July~~ Aug., 1994.

Michael Burnye
UNITED STATES DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STRUTHERS INDUSTRIES, INC., a Delaware corporation,	)	
Plaintiff,	)	
vs.	)	No. 94-CV-232-K
ATLANTIC CAPITAL CORPORATION OF CENTRAL FLORIDA, INC.; PULLMAN PUBLICATIONS, INC.; STEPHEN DECESARE; HOWARD JENKINS; and MARK J. MISSLER,	)	
Defendants.	)	

O R D E R

Now before this Court is the Defendants' Motion to Dismiss and/or Transfer for Improper Venue and Motion for Assessment of Attorney's Fees (Docket #2).

Plaintiff, Struthers Industries, Inc., ("Struthers") is a Delaware corporation with its principal place of business in Tulsa, Oklahoma. Defendants, Atlantic Capital Corporation of Central Florida, Inc., ("ACC"), and Wall Street Marketing, Inc., formerly known as Pullman Publications, Inc., ("PPI"), are foreign corporations having their principal place of business in the State of Florida. Defendants, Stephen DeCesare, Howard Jenkins and Mark J. Missler are individuals whom Plaintiff believes are officers and shareholders of ACC and who reside in Florida.

Struthers, in this action and in one previously before this Court[1], contends during early 1992 it was contacted by Defendants

[1]On November 18, 1993, Judge Thomas Brett transferred a similar action between the same parties, Case No. 93-C-641-B, to a Florida district court.

to assist in marketing the company and its stock. On July 1, 1992, Plaintiff entered into the Client Service Agreement with ACC, simultaneously executing a contract with PPI. In reliance upon Defendants' representations, Plaintiff delivered 120,000 shares of its common stock to ACC for sale to fund the required $420,000 payment for Defendants' marketing program. When Struthers requested payment of the sales proceeds received from ACC's sale of Struthers' 120,000 shares, ACC advised Plaintiff it had wire transferred $420,000 direct to PPI in payment of Plaintiff's obligations under Agreement. Struthers received copies of letters acknowledging the transfer and receipt of these amounts. Although Struthers requested further documentation, none was provided. Plaintiff alleges the wire transfer never took place or was substantially less than the $420,000; that ACC "dumped" 120,000 shares on the open market, resulting in the per share price to drop from $3.75 to $3.00.

Struthers claims involve fraud, misrepresentations in the sale of securities, bad faith, civil conspiracy and "additional" claims for 10(b)-5 violations.[2] It also claims that venue is properly before this Court pursuant to 15 U.S.C. 77v.

In response, Defendants argue that Plaintiff has once again filed this action for securities violations and fraud based upon certain misrepresentations allegedly made by Defendants with regard

[2]The First Amendment to Complaint, filed April 11, 1994, added causes of actions involving the sale of securities as defined in §2(3) of the Securities Act of 1933 [15 U.S.C. 77b(c)]. Plaintiff also indicates the Securities and Exchange Commission is investigating the Defendants for possible irregularities "similar to those alleged by Plaintiff."

to performance under two contracts: "Client Service Agreement" and "Investor Relations Contract." The latter contract contains a forum selection clause indicating "proper venue and jurisdiction of this agreement shall be the Circuit Court in Orange County, Florida." ACC contends that Plaintiff is attempting to avoid the lawful application of a contractual forum selection clause by pleading "fraud in the inducement." However, Defendants contend that the contracts were performed, in substantial part, in Florida.[3] All witnesses and documents are located in Florida (except Plaintiff).[4] Defendant further states that this choice does not effect the validity or binding nature of the contract between the parties.

Struthers argues that Defendants' objections to venue are moot as the contract is not at issue in the present Complaint and further argues that Defendants have waived their objection to venue by filing a Motion to Assess Attorney Fees in this Court in connection with the previously dismissed case. Defendants aver the Plaintiff has "repeatedly" cited language, provisions and terms of the contract between the parties and cannot avoid the legal effect of a forum selection clause by "simply choosing not to pursue a contractual claim."

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[3]Struthers alleges the Agreement was executed in counterparts by facsimile transmission, both in Oklahoma and Florida.

[4]There is some discrepancy as to whether any of the individual defendants named transacted business in Oklahoma. Plaintiff contends Howard Jenkins came to Tulsa, Oklahoma to solicit Struthers to hire ACC for the marketing of Plaintiff's company and stock. However, Defendants state that neither Stephen DeCesare nor Mark J. Missler were ever in Oklahoma but merely acted within the context of their corporate fiduciary capacity with regard to Struthers.

Plaintiff relies upon 28 U.S.C. § 1391 as well as 15 U.S.C. § 77v(a) to place venue in this district. Section 77v(a) provides, in part:

> ... Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. (Emphasis added.)

Although the pleadings and record are scant as to specific facts concerning the misrepresentations and fraudulent acts, the Court is of the opinion that it is highly probable the majority of the events or omissions complained of, and therefore witnesses to, occurred in the State of Florida. Other than the Plaintiff, all parties reside in the State of Florida.

It appears to the Court that the ultimate issue to be resolved is the applicability of the venue selection clause. Such clauses are *prima facie* valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances. Milk 'N' More, Inc. v. Beavert, 963 F.2d 1342, 1346 (10th Cir.1992). A party resisting enforcement carries a heavy burden of showing that the provision itself is invalid due to fraud or overreaching or that enforcement would be unreasonable and unjust under the circumstances. Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953, 957 (10th Cir.), cert. denied, 113 S.Ct. 658 (1992). A party seeking to avoid a choice provision on a fraud theory must plead fraud going to the specific provision.

Id. at 960. Plaintiff has not done so, and has not shown that enforcement would be unreasonable and unjust.

As noted in Adelson v. World Transportation, Inc., 631 F.Supp. 504, 507 (S.D.Fla. 1986), the Supreme Court has specifically discussed the validity of a forum selection clause in a securities action and the clause was held to be valid. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1973). In *Scherk*, the Court reasoned that:

> A contractual provision specifying in advance the forum in which disputes shall be litigated ... is ... an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.

Id. at 516. The fact that plaintiff has not alleged a claim titled "breach of contract" does not alter this conclusion. Pleading alternate non-contractual theories is not alone enough to avoid a forum selection clause if the claims asserted arise out of the contractual relation and implicate the contract's terms. Crescent Int'l Inc. v. Avatar Communities, Inc., 857 F.2d 943, 944 (3d Cir.1988). This Court finds the instant forum selection clause is valid and enforceable. This Court is persuaded that the proper interpretation correctly enforces the forum selection clause.

Plaintiff has also argued that Defendants have waived their right to object to the venue selection clause by inadvertently filing a motion in the case previously before this Court. As defined, waiver is the intentional relinquishment or abandonment of a known right. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). As a general rule, a party to a contract may waive a right thereunder

by conduct indicating an intention to relinquish it. Teleco, Inc. v. Southwestern Bell Tel. Co., 511 F.2d 949 (10th Cir.1975) However, the inadvertent filing of a motion in the case previously before this Court is not an intentional relinquishment of the Defendant's contractual rights, nor is there evidence that Plaintiff has been prejudiced. Therefore the Court does not agree and rejects Plaintiff's argument.

Although Plaintiff argues that a showing the provision itself is invalid because of fraud would justify a court in denying enforcement of the clause, these are mere allegations which the Court deems insufficient to void the choice of forum selection clause in the Agreement. And as this action arises out of the relationship created when the parties signed the contract containing the forum selection clause, this Court holds it is enforceable. The Supreme Court has held that a forum selection clause should not receive dispositive consideration, but is a significant factor under 28 U.S.C. §1404(a). Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22, 29-31 (1988). When viewed in conjunction with the other statutory factors of convenience and the interest of justice, (i.e., situs of significant events, location of witnesses and documents), the Court finds transfer appropriate.

Finally, the Court denies the requests of plaintiff and defendants for attorney fees. There is no indication that the 21-day "safe harbor" provision of Rule 11(c)(1)(A) F.R.Cv.P. has been complied with, and, upon independent review, the Court does not conclude that sanctions should be imposed on the Court's own

initiative.

It is the Order of the Court that this matter should be and the same is hereby transferred to the United States District Court for the Middle District of Florida.

The Court further DENIES the motion of Defendants for assessment of attorney fees as well as the demand of Plaintiff for same.

ORDERED this 23 day of August, 1994.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

EVA M. DANIELS, DONICE DANIELS, and ROY DANIELS,

Plaintiffs,

vs.

THE CITY OF KANSAS, OKLAHOMA; KANSAS POLICEMAN ALAN WILSON, personally and in his official capacity; DELAWARE COUNTY SHERIFF'S OFFICER VINCE SMITH, personally and in his official capacity; THE DELAWARE COUNTY BOARD OF COMMISSIONERS, EX REL; and VESPER CATRON,

Defendants.

ENTERED ON DOCKET

DATE AUG 25 1994

Case No. 93-C-941-K

FILED

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

J U D G M E N T

In accord with the Order filed August 23, 1994, sustaining the Defendant's Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendants, The City of Kansas, Oklahoma, Alan Wilson, Vince Smith, the Delaware County Board of Commissioners, and against the Plaintiffs, Eva Daniels, Donice Daniels, and Roy Daniels on their 42 U.S.C. §1983 claim. Plaintiffs shall take nothing on their civil rights claim, and the remaining pendent state claims are dismissed.

Dated, this 24 day of August, 1994.

Terry C. Kern

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TOLA ANN FOREMAN,

Plaintiff,

vs.

PRYOR FOUNDRY, INC.

Defendant.

No. 93-C-916-K

O R D E R

Before the Court is the motion of the defendant for summary judgment. Plaintiff seeks recovery in this action for alleged sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., and under Oklahoma's recognition of a tort cause of action for discharge in violation of public policy.

Plaintiff was hired by defendant Foundry as a custodian on April 3, 1984. Plaintiff worked at defendant in various jobs, each requiring physical strength and manual dexterity. Plaintiff was laid off many times and was aware that layoffs transpired according to seniority. From time to time she also "bumped" (moved into the positions of) other employees with less seniority than she. Plaintiff testified to being in the lower one-third of employees by rank of seniority.

Beginning January 21, 1986, plaintiff reported an on-the-job injury, claiming she had strained her right elbow doing her ordinary work duties. The appropriate Worker's Compensation forms were filed. Plaintiff received surgical treatment and was rated temporarily, totally disabled. She subsequently complained of

numbness to her right elbow and arm due to operating a piece of heavy equipment.

On October 12, 1987, plaintiff was released to return to her regular job duties with no restrictions. On June 5, 1989, the Workers' Compensation Court awarded plaintiff a 12% permanent, partial disability to her right arm for plaintiff's January, 1986 injury. On February 5, 1990, plaintiff successfully bid on and transferred to the position of Shell Core Machine Operator at a labor grade 6. The company had a reduction in force in July, 1991. Defendant contends that plaintiff was offered several jobs, but told Ed Mackey, Personnel/Safety Supervisor for defendant, that she did not think that she could physically handle the jobs offered to her. (Mackey deposition at 23-29). Plaintiff denies making such statements. (Plaintiff's affidavit at 1-2). Plaintiff accepted the "offer" of a custodian position, but defendant believed that plaintiff could not handle the position because of her existing elbow disability and denied her the position. Mr. Mackey testified that the responsibilities included carrying a three to four gallon mop bucket of water up and down stairs. Plaintiff denies that the custodial position required such actions. Plaintiff denies any physical limitation, and contends that she could have physically performed the custodial job.

On July 29, 1991, Local Union Steward Leroy Dollarhide filed a grievance on behalf of plaintiff, demanding that defendant provide evidence that plaintiff's physical limitations prohibited her from performing custodial duties. On March 2, 1992, the

grievance was settled on the condition that plaintiff be physically examined and meet the requirements for the custodian job. On March 4, 1992, Dr. Donald Collins examined plaintiff and determined that plaintiff was physically able to perform the job duties of a custodian. However, plaintiff was not placed in the custodial job. Based upon seniority, and because of increased customer demand, she was recalled to a Shell Core Machine Operator position at a labor grade 6. On March 16, 1992, plaintiff was notified of being laid off, based on seniority. On March 23, 1992, rather than take the layoff, plaintiff "bumped" (i.e., moved out an employee with less seniority) into Core Assembler, labor grade 5.

During a company safety meeting on April 2, 1992, one of plaintiff's co-workers, Butch Nichols, complained that plaintiff was not required to perform all her job duties. Plaintiff was asked why another employee had to unload axle cores for her, causing the line to stop to allow time for him to unload her axle cores. Plaintiff contends that Nichols is a "chronic complainer" and cites criticism of Nichols by supervisors for foul language and lack of cooperation. Plaintiff further contends that her job was to spray paint the axle cores, not to unload them. Further, that even if it were within her prescribed duties to unload axles, no one person, whether male or female, could keep up with the pace of five to six men sending the cores down the line, a job which had previously utilized only four men. Plaintiff admits she was unable to do the lifting required for her job and admits to breaking heavy goods that she attempted to lift even though her supervisor

instructed her to get help in lifting. Plaintiff asserts that her supervisor stated at the April 2, 1992 safety meeting that it was "his fault" because he had plaintiff "in the wrong place."

In June, 1992, defendant determined it needed to make other work force changes in response to decreased customer orders. Specifically, defendant reduced its work force by 14 employees (plaintiff and 13 males). Defendant asserts that plaintiff was offered the jobs of No-Bake Machine Operator, Casting Finisher labor grade 5 and Casting Despruer labor grade 4, all of which plaintiff declined on the basis that the work was too heavy. Plaintiff denies she stated any of the work was too heavy, and contends that the only position she declined was the Casting Despruer labor grade 4. (In Defendant's Exhibit 17, a letter from Mackey to the EEOC investigator, Mackey writes at page 5 that he and Leroy Dollarhide, the union representative, were present along with plaintiff when all available jobs were reviewed and eliminated from consideration. Plaintiff has produced no corroborating evidence for her version of events).

Defendant asserts that after all available jobs were rejected by plaintiff, she was placed on layoff status as of June 18, 1992. In opposition, plaintiff asserts that she wanted, and had seniority to "bump" into, the Big No Bake Utility job, but defendant instead chose to lay her off and put Jake Helmuth in her now-vacant position. Meanwhile, defendant placed another man, Danny Headrick, into the Big No Bake job which plaintiff wanted. The distinction between the two jobs has not been explained by plaintiff.

The union filed another grievance on plaintiff's behalf, alleging that defendant was discriminating against plaintiff because of her sex. After receiving an explanation of plaintiff's physical limitations in her right elbow, the union put a hold on the grievance until medical evidence that plaintiff could meet the lifting requirements was given. Defendant contends that plaintiff was given the opportunity to show if she could handle a utility worker's job duties, but that she indicated the mixers were too heavy. Plaintiff denies saying the mixers were too heavy.

Defendant asserts that plaintiff understood that the collective bargaining agreement requires that she be qualified for a job before she accepts it. In contrast, plaintiff states her understanding was that she must be qualified for a job before it is offered to her. In other words, she contends that the defendant was offering jobs it believed plaintiff was not qualified to perform, knowing that it would not allow her to accept them.

On August 24, 1992, plaintiff was recalled from layoff to Core Assembler on third shift at a labor grade 5. Plaintiff admits being advised that she would receive a temporary transfer to prove she could do a new job. (Plaintiff's Deposition at 15, ln. 4-13). Also, that she knew that the transfer to the big no-bake utility job was not a demotion but was a position equal to the one she held at the time. (Id. at 57, ln.5-14). With the grievance still pending, Mackey talked with Dollarhide about permitting plaintiff to try out for the utility worker position for one night under the supervision of another employee. Dollarhide reported back to

Mackey that plaintiff did not wish to try. (Mackey deposition at 67-68).

Plaintiff took sick leave in September, 1992. During the sick leave, Ed Mackey contacted plaintiff to ask when she would be coming back to work. Plaintiff said she did not know. Defendant says that two employees, "D. Headrick and D. Cooper", were temporarily transferred to the Core Department for short periods during one of plaintiff's layoffs, in conformity with the union contract. (Defendant's Brief at 10, ¶36). However, plaintiff says that Jake Helmuth and "another man" were brought into the core room. (Plaintiff's Brief at 9).

On October 21, 1992, plaintiff filed her claim with the EEOC. On November 6, 1992, she filed a charge with the Oklahoma Human Rights Commission. On November 9, 1992 plaintiff was bumped to Core Service Worker, labor grade 4. Plaintiff says this was done at the defendant's initiative and without her participation.

On January 11, 1993 plaintiff resigned, citing her doctor's recommendation that she should not return to defendant's employment due to the "hostile work environment." On March 4, 1993, the EEOC issued plaintiff her Notice of Right to Sue. Plaintiff filed the present action on June 4, 1993.

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party

must identify sufficient evidence which would require submission of the case to a jury. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-52 (1986). Where the nonmoving party will bear the burden of proof at trial, that party must "go beyond the pleadings" and identify specific facts which demonstrate the existence of an issue to be tried by the jury. Mares v. ConAgra Poultry Co., Inc., 971 F.2d 492, 494 (10th Cir. 1992).

Defendant notes, and plaintiff does not dispute, that plaintiff may only proceed upon a theory of constructive discharge because she resigned her position. Addressing the plaintiff's state-law claim, defendant correctly refers to the recent statement of the Tenth Circuit Court of Appeals, in the course of upholding a grant of summary judgment, that "[t]hus far, Oklahoma has not recognized constructive discharge as a theory of recovery." Hooks v. Diamond Crystal Specialty Foods, Inc., 997 F.2d 793, 803 (10th Cir.1993). However, this statement has been rendered dubious by Wilson v. Hess-Sweitzer & Brant, Inc., 864 P.2d 1279, 1282-1284 (Okla.1993) (finding that trial court did not err in instructing on constructive discharge).

As a second line of legal defense, defendant cites Sanchez v. Philip Morris, Inc., 992 F.2d 244 (10th Cir.1993), in which the court said that, under extant case law, the Oklahoma public policy exception is "limited to wrongful terminations motivated by race or retaliation" and that it "does not make all Title VII cases actionable. . . ." Id. at 249. The issue before the Court in Sanchez was whether the public policy exception included wrongful

failure to hire claims. The statements quoted above constitute dicta. This Court is not persuaded that the Supreme Court of Oklahoma, if confronted with the issue, would rule--as defendant urges--that a discriminatory discharge based upon race violates public policy, but one based upon sex does not. Tate v. Browning-Ferris, Inc., 833 P.2d 1218 (Okla.1992) is "limited" to racial discrimination and retaliation because that was the allegation in that case. In sum, this Court concludes plaintiff's state-law claim does not fail as a purely legal matter, but the evidentiary presentations of the parties must be considered.[1]

It is appropriate to use the burden-shifting formulation established for assessment of federal employment discrimination actions to analyze plaintiff's public policy tort claim. Tatum v. Philip Morris Inc., 16 F.3d 417, 1993 WL 520983 at n.3 (10th Cir.1993). Therefore, the discussion which follows is applicable to both plaintiff's Title VII claim and her wrongful discharge claim.

To establish a claim of constructive discharge under Title VII, employees must demonstrate that their employers' discriminatory conduct produced working conditions that a reasonable person would view as intolerable. Daemi v. Church's

[1] Plaintiff also cites the public policy expressed by the Age Discrimination in Employment Act, 29 U.S.C. §§621-34, the Americans with Disabilities Act, 42 U.S.C. §12101 et seq., and anti-discrimination laws of the State of Oklahoma, 25 O.S. §1101 et seq.. However, plaintiff's evidentiary presentation and legal discussion focuses almost exclusively upon sex discrimination. Even if Oklahoma's public policy discharge tort extends to these other statutes, plaintiff has not proven a violation of them by sufficient quantum to survive summary judgment.

Fried Chicken, Inc., 931 F.2d 1379, 1386 (10th Cir.1991). The test is an objective one, not focusing on whether the employer specifically intended its alleged illegal discriminatory acts to force plaintiff to resign; the employer is held to intend the reasonably foreseeable consequences of its actions. Derr v. Gulf Oil Corp., 796 F.2d 340, 344 (10th Cir.1986).[2]

Plaintiff contends that she was subjected to "at least" two instances of discriminatory acts by defendant, i.e., the 1991 and 1992 layoffs "where Plaintiff was denied positions because of her sex." (Plaintiff's Response Brief at 11). A perceived demotion or reassignment to a job with lower status or lower pay may, depending upon the individual facts of the case, constitute aggravating factors that would justify a finding of constructive discharge. James v. Sears, Roebuck and Co., Inc., 21 F.3d 989, 993 (10th Cir.1994). Here, even assuming that plaintiff has established a prima facie case, (doubtful in view of the fact that in the June, 1992, layoff plaintiff and 13 men were laid off), plaintiff has made no showing that the defendant's legitimate nondiscriminatory reason proffered here--concern about defendant's physical ability

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[2] The employer's subjective intent is irrelevant insofar as plaintiff need not prove a specific intent to force plaintiff to resign. However, even in a constructive discharge case, plaintiff must produce evidence of discriminatory intent or motive on defendant's part, which is the essence of a Title VII claim. See Hastings v. Saiki, 824 F.Supp. 969, 974-75 (D. Colo.1993), aff'd, 17 F.3d 1439, 1994 WL 43345 (10th Cir.1994). "To succeed on a constructive discharge theory, an employee must show not only that her employer created an unreasonably harsh work environment but also that her employer created such environment by its illegal discriminatory acts." Boyce v. Bd. of County Commissioners, ____ F.Supp. ____, 1994 WL 371391 (D. Kan.1994).

to do certain jobs--is pretextual. Still further, plaintiff has not, as she must under her claim in this case, proven that the alleged discriminatory acts made her working conditions intolerable. The evidence indicates that defendant made great effort to accommodate plaintiff in dealing with the established layoff and "bumping" system.

Plaintiff specifically refers to five items which she contends constitute "objective evidence" of discrimination. (Plaintiff's Response Brief at 14). Each will addressed in turn. (1) "Plaintiff was made to 'try-out' for a job when no male employees had previously been made to do." In view of plaintiff's medical history and previous breaking of a heavy item, it was perfectly reasonable to allow her to test her strength to see if she could physically perform a particular job's functions. Defendant states that it and the Union "have agreed to permit employees with disabilities a trial period to see if they are able to perform specific jobs." (Defendant's Opening Brief at 9, ¶32). Plaintiff counters that "Defendant never gave a 'trial period' to any male employee until after Plaintiff filed this action." The mere fact of being the first to undergo a test, now uniformly applied, is not proof of discrimination. There is no evidence that the plaintiff's "try-out" was a sham, and that she was falsely found to have physical limitations.

(2) "Plaintiff was refused jobs allegedly because of physical limitations, when no such limitations existed." Defendant argues the issue of whether plaintiff had physical limitations, and

whether defendant believed plaintiff had physical limitations, is not relevant to the issue of sex discrimination. (Defendant's Reply Brief at 6). The factual question is, however, relevant to the issue of pretext. While there is plainly a factual dispute on this subject, plaintiff has not satisfied the requisite burden of proof. For example, she protests that Jack Cooper relied on a third party's statement that plaintiff could not handle the mixers, when plaintiff asserts she herself made no such statement. (Plaintiff's Response Brief at 13). Reliance upon hearsay by a supervisor demonstrates poor judgment on his part, but, without more, is insufficient to demonstrate discrimination. Plaintiff has not offered evidence that Cooper did not believe the hearsay statement, but merely used it as a pretext. The Court is also not persuaded that a supervisor's reliance upon hearsay renders plaintiff's working conditions intolerable, such that she was forced to resign. A mistaken belief can be corrected by remaining on the job and communicating through proper channels.

(3) "Plaintiff was denied jobs in the bumping process, which jobs were then retained, or filled, by male employees contrary to the provisions of the seniority rules in effect at the workplace." Neither party has clearly pointed to portions of the record to prove or disprove this allegation. Again, however, plaintiff has not sufficiently demonstrated pretext on defendant's part, or that her working conditions were objectively intolerable. A finding of constructive discharge must not be based only on the discriminatory act; there must also be aggravating factors that make staying on

the job intolerable. James v. Sears, Roebuck and Co., Inc., 21 F.3d 989, 992 (10th Cir.1994). A perceived demotion or reassignment to a job with lower status or lower pay may, depending upon the individual facts of the case, constitute such aggravating factors. Id. at 993. Plaintiff has not shown that all of the jobs offered her were accompanied by lower status or lower pay.

(4) "Plaintiff was told by Leroy Dollarhyde [plaintiff spells the name "Dollarhyde" while defendant spells it "Dollarhide"], the union representative, that the supervisors did not want Plaintiff in their work areas because Plaintiff was a woman. . . ." When asked during his deposition about such a statement, Mr. Dollarhide said "that's the way I felt." (Deposition at 33, L.23). He identified no evidence beyond his subjective belief for the opinion.

(5) "[O]ne [of] the employees did not deny making a statement to Plaintiff and others to the effect that the only job that women should hold at the plant was a janitor's position." The employee is question did not admit making such a statement, either. Even if made, an isolated statement by a non-supervisory employee is insufficient to defeat the pending motion.

After a thorough review of the record presented, the Court agrees with defendant's synopsis: "Plaintiff admits that she had been through lay-offs and recalls numerous times throughout the course of her employment. See Defendant's Motion for Summary Judgment, Undisputed Material Facts, Paragraphs 1 through 4, undisputed by Plaintiff in her response. The Plaintiff fails to

produce any evidence in support of her argument that, somehow, the lay-off/recall procedure with which she was so familiar suddenly became 'intolerable'." (Defendant's Reply Brief at 9).

It is the Order of the Court that the motion of the defendant for summary judgment is hereby granted.

ORDERED this 24 day of August, 1994.

Terry C. Kern

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

OSTEOPATHIC HOSPITAL FOUNDERS ASSOCIATION, INC., d/b/a/ TULSA REGIONAL MEDICAL CENTER, Plaintiff,	)	
vs.	)	No. 93-C-869-K
BENJAMIN DEMPS, JR., Director of the State of Oklahoma Department of Human Services and JOE SAM VASSAR, Acting Chairman of the Oklahoma Commission for Human Services, Defendants.	)	

O R D E R

A hearing was held on December 1, 1993, before the Honorable James O. Ellison in which evidence was presented regarding the motion of the plaintiff for preliminary injunction. The parties agreed to maintain the status quo pending a decision. Supplemental filings were authorized by Judge Ellison and by Magistrate Judge Wagner, and have been completed. By Order of June 16, 1994, this matter was transferred to the undersigned. The Court has reviewed the transcript of the hearing held before Judge Ellison, in addition to all submitted materials. Upon consideration of the pleadings, the briefs of the parties, the evidence presented at the hearing both by testimony and exhibit, and the proposed findings of fact and conclusions of law submitted by the parties, the Court hereby enters its Findings of Fact and Conclusions of Law in accordance with Rule 52(a) and Rule 65(d) F.R.Cv.P..

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FINDINGS OF FACT

1. Tulsa Regional Medical Center ("TRMC") is an Oklahoma non-profit corporation providing health care services in Tulsa, in the Northern District of Oklahoma, to patients eligible to receive Medicaid reimbursement for those services pursuant to Title XIX of the Social Security Act (42 U.S.C. §1396 et seq.), commonly known as the Medicaid Act (the "Act").

2. The Oklahoma Department of Human Services ("DHS") is the state agency designated pursuant to the Act to administer the Oklahoma State Title XIX Medicaid Plan (the "Oklahoma Plan") and the agency which contracts with hospitals for the provision of services to Medicaid patients.

3. Defendant Demps is the Director of DHS and has overall responsibility for the administration of the Oklahoma Plan and for assuring compliance by DHS with state and federal law.

4. Defendant Vassar is the acting chairman of the Commission for Human Services.

5. The Oklahoma Plan is a cooperative federal-state program established pursuant to the Act for the purpose of enabling the state of Oklahoma to furnish medical assistance to aged, blind, or disabled individuals, or members of families with dependent children, whose income and resources are insufficient to meet the costs of necessary medical services.

6. The federal government and Oklahoma share the costs of such aid. Approximately 70% of the cost of each dollar is borne by the federal government and 30% is borne by Oklahoma.

7. Under the Oklahoma Plan, DHS makes payment adjustments ("Disproportionate Share Adjustments") to provide additional payments to certain hospitals that service a disproportionate number of low-income patients.

8. TRMC is a Disproportionate Share Hospital and has received Disproportionate Share Adjustments from DHS.

9. Under the Oklahoma Plan, there are two tests under which a hospital qualifies to receive Disproportionate Share Adjustments: (a) if its Medicaid inpatient utilization rate is at least one standard deviation above the mean Medicaid inpatient utilization rate for hospitals receiving Medicaid payments in the state (the "Medicaid Test") or (b) if the hospital's low-income utilization rate exceeds 25% (the "Low-Income Test"). See also 42 U.S.C. §1396r--4(b)(1).

10. The Oklahoma Plan provides for different minimum Disproportionate Share Adjustments depending upon whether the hospital qualifies as a Disproportionate Share Hospital under the Medicaid Test or the Low-Income Test. Hospitals qualifying under the Low-Income Test receive a smaller minimum adjustment.

11. In early 1992, the hospital filed a Medicare cost report. Defendants contend that the report incorrectly aggregated Medicaid patient days with Oklahoma Department of Health patient days, thereby making plaintiff no longer eligible under the Medicaid inpatient utilization test (Transcript at 7-8). (Plaintiff denies any intentional misstatement in the incorrect figures). Plaintiff administratively appealed the determination and the State found

that the hospital did qualify under the low-income test. The payment rate under this second test was substantially different under the Oklahoma Plan.

12. A dispute arose over amounts owed or to be recouped. TRMC received Disproportionate Share Adjustments of approximately $1,900,000.00 from July 1, 1992 to May 27, 1993. DHS now alleges that TRMC has been overpaid in the amount of $1,677,693.94 because it qualified as Disproportionate Share Hospital under the Low-Income Test but not under the Medicaid Test. DHS contends the error arose from the inaccurate figures in TRMC's Medicaid Cost Report. TRMC denies knowing that DHS would rely on the Cost Report in establishing reimbursement rates or determining TRMC's qualification for Disproportionate Share Adjustments.

13. Defendants contend that TRMC qualifies as a Disproportionate Share Hospital under the Low Income Test but not the Medicaid Test and that, consequently, TRMC is entitled only to a payment adjustment of 4% effective July 1, 1992 and 2% effective January 1, 1993 (at which time the Oklahoma Plan was amended to reduce the Disproportionate Share Adjustment percentages) under the Low Income Test, instead of 24.92% and 12.46% respectively under the Medicaid Test.

14. On August 26, 1993, Defendants advised TRMC that, on September 26, 1993, Defendants would begin offsetting future payments to TRMC in order to recover the amounts allegedly overpaid. To date, approximately $320,000.00 owed for services actually provided by TRMC has been withheld by Defendants.

15. Defendants have advised plaintiff that Disproportionate Share Adjustment percentages established under the Oklahoma Plan may not be administratively appealed.

16. Plaintiffs contend that the Oklahoma Plan, and the proposed offsets, violate the Boren Amendment to the Medicaid Act, 42 U.S.C. §1396a(a)(13)(A), which mandates a state plan setting payment rates "which the State finds, and makes assurances to the Secretary [of Health and Human Services], are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable State and Federal laws, regulations, and quality and safety standards. . . ." The violations set forth in the Complaint are that the Oklahoma Plan does not provide reimbursement rates adequate to permit TRMC to meet its reasonable costs, that the Plan discriminates against hospitals which qualify under the Low-Income Test but not the Medicaid Test, and that the amendments to the Oklahoma Plan reducing payment percentages were not supported by necessary findings and were promulgated arbitrarily. Defendants contend that the Oklahoma Plan complies with the Act.

17. TRMC contends that it lost approximately $660,000.00 from providing services to Medicaid patients during the time DHS alleges TRMC was overpaid. Defendants note that generally accepted accounting principles were not used in that determination (Transcript at 33, ll.3-6).

18. The budget of DHS for the Oklahoma Plan is in excess of

$1 billion dollars. Total revenues for TRMC in 1992 were approximately $137 million dollars. However, less than 10% of this amount was from DHS payments (Transcript at 35, ll. 2-5).

19. If the offsets are permitted, TRMC will forfeit a total of $1,677,693.94. If the offsets are not permitted pending trial, DHS's share of monies not recouped will only be $407,308.17, or 30% of the alleged overpayments. The other 70% are matching funds paid by the federal government.

20. Disproportionate Share payments are made in addition to the "base rate" paid to hospitals under Medicaid. (Transcript at 45, ll.21-23).[1]

To the extent that any of these Findings of Fact constitute Conclusions of Law, they should be so considered.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of this action pursuant to 28 U.S.C. §§1331 and 1343(a)(3).

2. The Court is authorized to issue appropriate declaratory relief under 28 U.S.C. §2201 and appropriate injunctive relief under Rule 65 F.R.Cv.P..

3. The Boren Amendment creates rights enforceable by 42 U.S.C. § 1983. Wilder v. Virginia Hospital Association, 496 U.S.

[1] At page 11 of Defendants' Proposed Findings of Fact and Conclusions of Law, they devote two sentences to "failure to exhaust administrative remedies", asserting that TRMC has not administratively appealed its base rate to DHS, such an appeal being permitted by the agency. The Court requires further explanation as to why some appeals are apparently permitted and some are not. If defendants wish to raise this defense by formal motion to which plaintiff may respond, they may do so. Otherwise, the Court shall deem the defense waived.

498, 524 (1990).

4. A preliminary injunction is an extraordinary remedy, the exception rather than the rule. Potawatomi Indian Tribe v. Enterprise Management Consultants, 883 F.2d 886, 888 (10th Cir.1989). Because it constitutes drastic relief to be provided with caution, a preliminary injunction should be granted only in cases where the necessity for it is clearly established. Id. at 888-889.

5. To obtain a preliminary injunction, the movant has the burden of establishing that (1) the moving party will suffer irreparable injury unless the injunction issues, (2) the threatened injury to the moving party outweighs whatever damage the proposed injunction may cause the opposing party, (3) the injunction, if issued, would not be adverse to the public interest and (4) there is a substantial likelihood that the moving party will eventually prevail on the merits. Resolution Trust Corp. v. Cruce, 972 F.2d 1195, 1198 (10th Cir.1992).

6. When a party seeking a preliminary injunction satisfies the first three requirements, the standard for meeting the fourth "probability of success" prerequisite becomes more lenient. The movant need only show questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation. Id. at 1199.

7. Defendants argue that the plaintiff's requested relief is barred by the Eleventh Amendment to the United States Constitution, which prohibits retrospective monetary relief against a state.

Green v. Mansour, 474 U.S. 64, 68 (1985). Defendants contend that the injunctive relief which plaintiff seeks is a remedy for an alleged past violation of the Medicaid Act (i.e., the conclusion by the state that TRMC had been overpaid).

8. The Court rejects this argument, based upon the posture of this case. The State may have reached a decision in the past that it had overpaid, but that decision per se did no harm to plaintiff. Defendants are now seeking, by way of setoff, to recoup monies already paid to the plaintiff. The parties are presently maintaining the status quo, but if no injunction is granted, the State plans to continue its setoffs in the future. The injury which plaintiff alleges and seeks to avoid (i.e., loss of funds through setoff) is prospective. Claims for purely prospective, injunctive relief may be adjudicated without running afoul of the Eleventh Amendment. Oklahoma Nursing Home Ass'n v. Demps, 816 F.Supp. 688, 694 (W.D.Okla.1992) (citing Ex Parte Young, 209 U.S. 123 (1908)).[2] "[A] private person may bring an equitable action to force state officers to comply with federal law in the future even though they will be required to spend state funds to so comply." Rotunda & Nowak, Treatise on Constitutional Law: Substance and Procedure, 2d, §2.12 at 149 (1992).

9. The Conclusions of Law stated in Paragraphs 7 and 8 also lead the Court to conclude that irreparable harm has been

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[2] The application of the Eleventh Amendment countervails against defendant's argument, which relies upon Tri-State Generation & Trans. v. Shoshone R. Power, 874 F.2d 1346, 1361-62 (10th Cir.1989), that because plaintiff's loss may be compensated by damages, injunctive relief is inappropriate.

sufficiently established for purposes of this motion. Plaintiff will suffer harm from the setoffs in payment which the State proposes. Certain services will be reduced and a reduction in force will be necessary. A legal remedy in damages does not exist and the parties apparently agree that no adequate state administrative remedy is available. In such circumstances, irreparability is evidenced. See Kansas Health Care v. Kansas DSRS, 822 F.Supp. 687, 698 (D. Kan. 1993), aff'd, ____ F.3d _____ (10th Cir.)(Aug.4, 1994).[3]

10. The Court further concludes the plaintiff has sufficiently established the injury to its interests outweighs whatever damage the injunction would cause defendants. As stated in Findings of Fact Nos. 18 and 19, the financial detriment to plaintiff if the offsets are allowed to proceed is greater than the financial detriment to the State if the offsets are enjoined pending trial.

11. Defendants argue that granting the requested injunction will harm the public interest because "[i]f medical providers are able to stop [the recoupment] process before proving a clear violation of the law, DHS's attempt to enforce the Medicaid Act will be a nullity." (Defendant's November 4, 1993 Response at 6).

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[3] Defendants also contend that the "unclean hands" doctrine bars equitable relief. While emphatically stating that they do not claim fraud was involved, defendants assert that the incorrect figures contained in the Cost Report, upon which defendants relied, prevent plaintiff from obtaining an injunction. Not only does plaintiff claim inadvertence in supplying any incorrect figures, it also denies knowing that defendants would use the report to ascertain payment rates. The Court rejects defendants' argument for purposes of the present motion.

Such an argument, if accepted, would virtually do away with injunctive relief in cases of this type. The Court is more persuaded by the authority which holds that litigation which seeks to enforce the provisions of the Boren Amendment is itself in the public interest. See Temple Univ. v. White, 941 F.2d 201, 220 & n.27 (3rd Cir.1991); Kansas Health Care, 822 F. Supp. at 699. Therefore, the Court determines the requested injunction is not adverse to the public interest.

12. Finally, the Court concludes that the plaintiff has satisfied the fourth prerequisite of "probability of success." It has shown "questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation." RTC v. Cruce, 972 F.2d at 1199. At the preliminary injunction hearing, the parties introduced evidence supporting their respective positions as to alleged violations of the Boren Amendment. This conflicting evidence raises factual and legal issues which cannot be resolved at this time. The complex issues presented by this case have led to burgeoning litigation across the country. While plaintiff may not ultimately prevail, the Court cannot reach such a conclusion without a considerably more detailed factual and legal presentation than has thus far been made. All four prerequisites to a preliminary injunction having been satisfied, the same shall issue.

To the extent any of these Conclusions of Law constitute Findings of Fact, they should be so considered.

It is the Order of the Court that the motion of the plaintiff

for temporary restraining order is hereby declared moot.

It is the further Order of the Court that the motion of the plaintiff for preliminary injunction is hereby granted. Defendants are hereby enjoined from offsetting Medicaid reimbursement payments to plaintiff TRMC for the purpose of recovering overpayments allegedly made from July 1, 1992 to June 30, 1993. This injunction shall remain in effect until further Order of the Court.

ORDERED this 23 day of August, 1994.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
EDWARD WALLACE GERMANY;	)	
TONYA MECHELLE GERMANY;	)	
STATE OF OKLAHOMA, ex rel.	)	
OKLAHOMA EMPLOYMENT SECURITY	)	
COMMISSION;	)	
COUNTY TREASURER, Tulsa County,	)	
Oklahoma;	)	
BOARD OF COUNTY COMMISSIONERS,	)	
Tulsa County, Oklahoma,	)	
	)	
Defendants.	)	**CIVIL ACTION NO. 94-C-385-B**

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 24 day of Aug., 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; the Defendants, EDWARD WALLACE GERMANY and TONYA MECHELLE GERMANY, appear by their attorney Joe Richard; and the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA EMPLOYMENT SECURITY COMMISSION, appears not having previously filed its Disclaimer.

The Court being fully advised and having examined the court file finds that the Defendant, EDWARD WALLACE GERMANY, was served a copy of Summons and Complaint on May 26, 1994; that the Defendant, TONYA MECHELLE GERMANY, was served a copy of Summons

and Complaint on May 26, 1994; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA EMPLOYMENT SECURITY COMMISSION, was served a copy of Summons and Complaint on June 7, 1994 by Certified Mail; that Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on April 19, 1994; and that Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on April 19, 1994.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on May 9, 1994; and that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA EMPLOYMENT SECURITY COMMISSION, filed its Disclaimer on June 24, 1994.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> **Lot Twelve (12), Block One (1), NORTHGATE ADDITION, an Addition in Tulsa County, State of Oklahoma, according to the recorded Plat thereof.**

The Court further finds that on June 11, 1980, the Defendants, EDWARD WALLACE GERMANY and TONYA MECHELLE GERMANY, executed and delivered to Charles F. Curry Company a mortgage note in the amount of $21,100.00, payable in monthly installments, with interest thereon at the rate of Twelve percent (12%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, EDWARD WALLACE GERMANY and TONYA MECHELLE GERMANY, executed and delivered to Charles F. Curry Company, a mortgage dated June 11, 1980, covering the above-described property. Said mortgage was recorded on June 16, 1980, in Book 4479, Page 2198, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 9, 1990, Charles F. Curry Company, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on February 20, 1990, in Book 5237, Page 489, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 1, 1990, the Defendant, TONYA MECHELLE GERMANY, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on February 1, 1991.

The Court further finds that the Defendants, EDWARD WALLACE GERMANY and TONYA MECHELLE GERMANY, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, EDWARD WALLACE GERMANY and TONYA MECHELLE GERMANY, are indebted to the Plaintiff in the principal sum of $31,190.73, plus

interest at the rate of Twelve percent per annum from March 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $17.00 which became a lien on the property as of June 26, 1992; a lien in the amount of $9.00 which became a lien on the property as of June 25, 1993; and a claim in the amount of $9.00 for 1993 taxes due. Said liens and claim are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, and STATE OF OKLAHOMA, ex rel. OKLAHOMA EMPLOYMENT SECURITY COMMISSION, claim no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, EDWARD WALLACE GERMANY and TONYA MECHELLE GERMANY, in the principal sum of $31,190.73, plus interest at the rate of Twelve percent per annum from

March 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.67 percent per annum until paid, plus the costs of this action, and any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of $35.00 for personal property taxes for the years 1991 - 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, and STATE OF OKLAHOMA, ex rel. OKLAHOMA EMPLOYMENT SECURITY COMMISSION, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, EDWARD WALLACE GERMANY and TONYA MECHELLE GERMANY, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the

Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $35.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

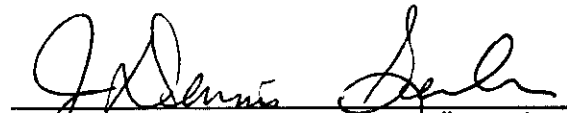
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

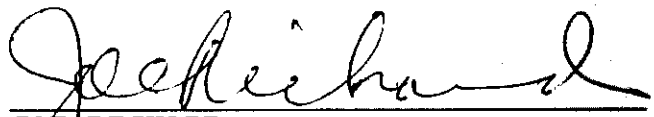
APPROVED:

STEPHEN C. LEWIS
United States Attorney

NEAL B. KIRKPATRICK
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



J. DENNIS SEMLER, OBA #8076
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4841
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma



JOE RICHARD,
3000 Center, Ste 308
3015 E. Skelly Dr.
Tulsa, Oklahoma 74105
(918) 747-9363
Attorney for Defendants,
Edward Wallace Germany and
Tonya Mechelle Germany

Judgment of Foreclosure
Civil Action No. 94-C-385-B

NBK:flv

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	FILED
Plaintiff,	)	AUG 24 1994
vs.	)	Richard M. Lawrence, Clerk U.S. DISTRICT COURT
BILLY GENE FARRIS, JR.; CARLA CAY FARRIS; FORD MOTOR CREDIT COMPANY; U.N. SERVICE CORP. COUNTY TREASURER, Washington County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Washington County, Oklahoma,	)	ENTERED ON DOCKET DATE
Defendants.	)	**CIVIL ACTION NO. 94-C-523-B**

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 24 day of Aug., 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendant, U.N. SERVICE CORP., appears not having previously filed a Disclaimer, the Defendants, COUNTY TREASURER, Washington County, Oklahoma, BOARD OF COUNTY COMMISSIONERS, Washington County, Oklahoma, BILLY GENE FARRIS, JR., CARLA CAY FARRIS, and FORD MOTOR CREDIT COMPANY, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, BILLY GENE FARRIS, JR., signed a Waiver of Service of Summons on June 13, 1994; that the Defendant, CARLA CAY FARRIS, signed a Waiver of Service of Summons on June 13, 1994; that the Defendant, U.N. SERVICE CORP., signed a Waiver of Service of Summons on June 8, 1994; that the

Defendant, FORD MOTOR CREDIT COMPANY, was served a copy of Summons and Complaint by Certified Mail, on May 24, 1994; that Defendant, COUNTY TREASURER, Washington County, Oklahoma, was served a copy of Summons and Complaint on May 23, 1994 by Certified Mail; and that Defendant, BOARD OF COUNTY COMMISSIONERS, Washington County, Oklahoma, was served a copy of Summons and Complaint on May 23, 1994 by Certified Mail.

It appears that the Defendant, U.N. SERVICE CORP., filed its Disclaimer on June 8, 1994; and that the Defendants, COUNTY TREASURER, Washington County, Oklahoma, BOARD OF COUNTY COMMISSIONERS, Washington County, Oklahoma, BILLY GENE FARRIS, JR., CARLA CAY FARRIS, and FORD MOTOR CREDIT COMPANY, have failed to answer and default has therefore been entered by the Clerk of this Court.

The Court further finds that on January 21, 1992, BILLY GENE FARRIS, JR. and CARLA CAY FARRIS, filed their voluntary petition in bankruptcy in Chapter 13 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 91-03318-W. On May 16, 1994, the United States Bankruptcy Court for the Northern District of Oklahoma entered its order modifying the automatic stay afforded the debtors by 11 U.S.C. § 362 and directing abandonment of the real property subject to this foreclosure action and which is described below.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real

property located in Washington County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Nineteen (19), Block Twenty-four (24), of Oak Park Village, Section II, an Addition to Bartlesville, Washington County, Oklahoma.

The Court further finds that on June 18, 1979, Gregg R. Maynard and Lee A. Maynard, executed and delivered to Modern American Mortgage Corporation, their mortgage note in the amount of $33,050.00, payable in monthly installments, with interest thereon at the rate of Ten percent (10%) per annum.

The Court further finds that as security for the payment of the above-described note, Gregg R. Maynard and Lee A. Maynard, husband and wife, executed and delivered to Modern American Mortgage Corporation, a mortgage dated June 18, 1979, covering the above-described property. Said mortgage was recorded on June 21, 1979, in Book 724, Page 896, in the records of Washington County, Oklahoma.

The Court further finds that on January 12, 1981, Modern American Mortgage Corporation assigned the above-described mortgage note and mortgage to Union National Bank of Little Rock. This Assignment of Mortgage was recorded on March 12, 1984, in Book 813, Page 863, in the records of Washington County, Oklahoma.

The Court further finds that on May 1, 1988, Union National Bank of Little Rock assigned the above-described mortgage note and mortgage to U.N. Service Corp. This Assignment of Mortgage was recorded on October 24, 1988, in Book 850, Page 229, in the records of Washington County, Oklahoma.

The Court further finds that on January 11, 1990, U.N. Service Corp. assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on February 5, 1990, in Book 856, Page 1088, in the records of Washington County, Oklahoma.

The Court further finds that Defendants, BILLY GENE FARRIS, JR. and CARLA CAY FARRIS, currently hold the fee simple title to the property via mesne conveyances and are the current assumptors of the subject indebtedness.

The Court further finds that the Defendants, BILLY GENE FARRIS, JR. and CARLA CAY FARRIS, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on February 1, 1991.

The Court further finds that the Defendants, BILLY GENE FARRIS, JR. and CARLA CAY FARRIS, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, BILLY GENE FARRIS, JR. and CARLA CAY FARRIS, are indebted to the Plaintiff in the principal sum of $44,143.34, plus interest at the rate of Ten percent per annum from March 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendants, BILLY GENE FARRIS, JR. and CARLA CAY FARRIS, FORD MOTOR CREDIT COMPANY, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Washington County, Oklahoma, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, U.N. SERVICE CORP., claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, BILLY GENE FARRIS, JR. and CARLA CAY FARRIS, in the principal sum of $44,143.34, plus interest at the rate of Ten percent per annum from March 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.67 percent per annum until paid, plus the costs of this action, and any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BILLY GENE FARRIS, JR. and CARLA CAY FARRIS, FORD

MOTOR CREDIT COMPANY, U.N. SERVICE CORP., COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Washington County, Oklahoma, have no right, title or interest in the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, BILLY GENE FARRIS, JR. and CARLA CAY FARRIS, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

NEAL B. KIRKPATRICK
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

Judgment of Foreclosure
Civil Action No. 94-C-523-B

NBK:flv

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JERRY LEWIS BROWN,

Petitioner,

vs.

RON CHAMPION,

Respondent.

No. 94-C-503-E

ORDER

Respondent's motion to dismiss Petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is now at issue before the Court. Petitioner has responded in the form of a motion to stay proceeding to afford him an opportunity to exhaust his state remedies.

After carefully reviewing Respondent's motion to dismiss, the attached record, and Petitioner's motion to stay, the Court concludes that the petition should be dismissed without prejudice to it being refiled when Petitioner has fully exhausted his state remedies. **ACCORDINGLY, IT IS HEREBY ORDERED that** Respondent's motion to dismiss (doc. #5) **is granted**, that Petitioner's motion to stay (doc. #6) is **denied, and that** the above captioned habeas corpus action (doc. #1) **is dismissed without prejudice.**

SO ORDERED THIS 24th day of August, 1994.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LINDA FERN WALKER,

Plaintiff,

vs. No. 93-C-897-K

FARMERS INSURANCE COMPANY,

Defendant.

O R D E R

The Court has for consideration Defendant Farmers Insurance Company's Advice to the Court. Apparently, an Order of Remand was inadvertently entered in this case prior to its transfer to the undersigned.

It is the Order of the Court that the Order of Remand entered on June 14, 1994 is hereby vacated. The parties are directed to obtain the original pleadings from the Office of the Court Clerk of Tulsa County for resubmission in this case.

ORDERED this 23 day of August, 1994.

Terry C. Kern

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

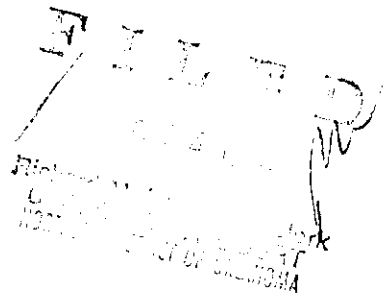
24

ENTERED ON DOCKET
DATE AUG 25 1994

ATTACHMENT A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DARLENE RAY, Plaintiff,	)	
v.	)	Case No. 93-C-672-K
RED DEVIL, INC., Defendant.	)	



ORDER OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1) and the Joint Stipulation of Dismissal with Prejudice filed by the parties, the Court hereby orders that this case be dismissed with prejudice, with no finding of any sex or race discrimination, or other misconduct on the part of Defendant Red Devil, Inc.

Terry C. Kern

JUDGE OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
LORETTA F. HAYMAN;	)	
DUANE RAY;	)	
STATE OF OKLAHOMA, ex rel.	)	
OKLAHOMA TAX COMMISSION;	)	
CITY OF BROKEN ARROW, Oklahoma;	)	
COUNTY TREASURER, Tulsa County,	)	
Oklahoma;	)	
BOARD OF COUNTY COMMISSIONERS,	)	
Tulsa County, Oklahoma,	)	
	)	
Defendants.	)	**CIVIL ACTION NO. 94-C-513-B**

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 24 day of Aug., 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, appears by Kim D. Ashley, Assistant General Counsel; the Defendant, CITY OF BROKEN ARROW, Oklahoma, appears by Michael Vanderburg, City Attorney, Broken Arrow, Oklahoma; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear not having previously claiming no interest; and the Defendants, LORETTA F. HAYMAN now Loretta F. Hayman-Ray and DUANE RAY, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, LORETTA F. HAYMAN now Loretta F. Hayman-Ray, Waived Service of Summons on May 23, 1994,

which was filed on May 26, 1994; that the Defendant, DUANE RAY, Waived Service of Summons on June 5, 1994, which was filed on June 7, 1994; that the Defendant, CITY OF BROKEN ARROW, Oklahoma, was served a copy of Summons and Complaint on May 20, 1994, by Certified Mail.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on May 27, 1994; that the Defendant, CITY OF BROKEN ARROW, Oklahoma, filed its Answer on June 3, 1994; the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Answer on Juen 15, 1994; and the Defendants, LORETTA F. HAYMAN now Loretta F. Hayman-Ray and DUANE RAY, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, LORETTA F. HAYMAN, is one and the same and sometimes referred to as Loretta Hayman, and is now known as Loretta F. Hayman-Ray, will hereinafter be referred to as "LORETTA F. HAYMAN."

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Ten (10), Block Three (3), LEISURE PARK II, an Addition to the City of Broken Arrow, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on May 31, 1985, Perry W. Hood, executed and delivered to First Security Mortgage Company, his mortgage note in the amount of $62,996.00, payable in monthly installments, with interest thereon at the rate of Eleven and One-half percent (11.5%) per annum.

The Court further finds that as security for the payment of the above-described note, Perry W. Hood, a single person, executed and delivered to First Security Mortgage Company, a mortgage dated May 31, 1985, covering the above-described property. Said mortgage was recorded on June 11, 1985, in Book 4868, Page 1707, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 31, 1985, First Security Mortgage Company, assigned the above-described mortgage note and mortgage to CFS Mortgage. This Assignment of Mortgage was recorded on January 22, 1986, in Book 4920, Page 415, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 20, 1989, Commercial Federal Mortgage Corporation fka CFS Mortgage Corporation, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on September 25, 1989, in Book 5209, Page 1508, in the records of Tulsa County, Oklahoma. A Corrected Assignment of Mortgage was filed on January 10, 1990, in Book 5229, Page 2635, in the records of Tulsa County, Oklahoma.

The Court further finds that Defendant, LORETTA F. HAYMAN, currently holds the fee simple title to the property via mesne conveyances and is the current assumptor of the subject indebtedness.

The Court further finds that on October 1, 1989, the Defendant, LORETTA F. HAYMAN, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on September 1, 1990, August 1, 1991 and February 1, 1993.

The Court further finds that the Defendant, LORETTA F. HAYMAN, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, LORETTA F. HAYMAN, is indebted to the Plaintiff in the principal sum of $99,570.02, plus interest at the rate of Eleven and One-Half percent per annum from May 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, STATE OF OKLAHOMA, ex rel, has a lien on the property which is the subject matter of this action by virtue of a Tax Warrant in the amount of $222.14 which became a lien on the property as of March 11, 1992. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, CITY OF BROKEN ARROW, Oklahoma, claims no right title or interest in the subject real property, except insofar as is the lawful holder of certain easements as shown on the duly recorded plat.

The Court further finds that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that the Defendants, LORETTA F. HAYMAN and DUANE RAY, are in default and have no right title or interest in the subject real property.

The Court further finds that the Internal Revenue Service has a lien upon the property by virtue of Federal Tax Lien No. 739125639 in the sum of $3,037.77, filed of record on September 18, 1991. Inasmuch as government policy prohibits the joining of another federal agency as party defendant, the Internal Revenue Service is not made a party hereto; however, the lien will be released at the time of sale should the property fail to yield an amount in excess of the debt to the Plaintiff.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover

judgment against the Defendant, LORETTA F. HAYMAN, in the principal sum of $99,570.02, plus interest at the rate of Eleven and One-Half percent per annum from May 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.67 percent per annum until paid, plus the costs of this action, and any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, have and recover judgment In Rem in the amount of $222.14 for State Taxes due and owing, plus accrued and accruing interest, and the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, CITY OF BROKEN ARROW, Oklahoma, has no right, title or interest in the subject real property, except insofar as it is the lawful holder of certain easements as shown on the duly recorded plat.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, LORETTA F. HAYMAN and DUANE RAY, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, LORETTA F. HAYMAN, to satisfy the judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of

Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, in the amount of $222.14, state taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants

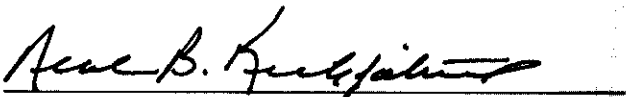
and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT

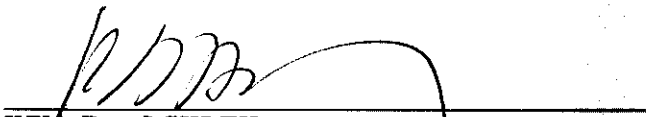
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



NEAL B. KIRKPATRICK
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



KIM D. ASHLEY
Assistant General Counsel
P.O. Box 53248
Oklahoma City, Oklahoma 73152-3248
(405) 521-3141
Attorney for the Defendant,
State of Oklahoma, ex rel.
Oklahoma Tax Commission

MICHAEL R. VANDERBURG
City Attorney,
CITY OF BROKEN ARROW
P. O. Box 610
Broken Arrow, OK 74012
(918) 251-5311
Attorney for the Defendant,
City of Broken Arrow, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C-513-B

NBK:flv

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TOLA ANN FOREMAN,

Plaintiff,

vs.

PRYOR FOUNDRY, INC.

Defendant.

No. 93-C-516-K

JUDGMENT

This matter came before the Court for consideration of the defendant's motion for summary judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the defendant and against the plaintiff.

ORDERED this 24 day of August, 1994.

Terry C. Kern

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

AMERICAN CENTRAL GAS COMPANIES, INC., a Delaware corporation,	)	
Plaintiff,	)	
v.	)	Case No. 92-C-1091B
PAUL E. JORNAYVAZ, an individual, and JEFFREY M. WEISER, an individual,	)	(Consolidated with: Case No. 92-C-1092E Case No. 92-C-1148E Case No. 92-C-1149B)
Defendants.	)	

JOINT STIPULATION OF DISMISSAL

Plaintiff American Central Gas Companies, Inc., and defendants Paul E. Jornayvaz and Jeffrey M. Weiser, pursuant to Fed. R. Civ. P. 41, hereby stipulate that all claims asserted in the above-referenced consolidated actions are hereby dismissed with prejudice.

Respectfully submitted,

ALBRIGHT & RUSHER

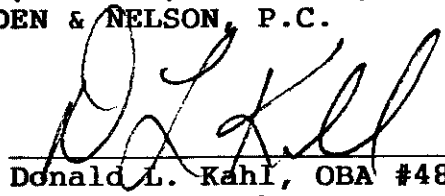
By: _____

James W. Rusher, OBA #4855
Heath E. Hardcastle, OBA #14247
2600 Bank IV Center
15 West Sixth Street
Tulsa, Oklahoma 74172
(918) 583-5800

ATTORNEYS FOR PLAINTIFF

and

HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C.

By: 

Donald L. Kahl, OBA #4855
Michele T. Gehres, OBA #10986
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74172
(918) 588-2700

ATTORNEYS FOR DEFENDANTS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 23 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

COPY

AMERICAN CENTRAL GAS COMPANIES, INC., a Delaware corporation,

Plaintiff,

v.

PAUL E. JORNAYVAZ, an individual, and JEFFREY M. WEISER, an individual,

Defendants.

Case No. 92-C-1091B

(Consolidated with:
Case No. 92-C-1092E
Case No. 92-C-1148E
Case No. 92-C-1149B)

ENTERED ON DOCKET
DATE AUG 24 1994

JOINT STIPULATION OF DISMISSAL

Plaintiff American Central Gas Companies, Inc., and defendants Paul E. Jornayvaz and Jeffrey M. Weiser, pursuant to Fed. R. Civ. P. 41, hereby stipulate that all claims asserted in the above-referenced consolidated actions are hereby dismissed with prejudice.

Respectfully submitted,

ALBRIGHT & RUSHER

By: _____

James W. Rusher, OBA #4855
Heath E. Hardcastle, OBA #14247
2600 Bank IV Center
15 West Sixth Street
Tulsa, Oklahoma 74172
(918) 583-5800

ATTORNEYS FOR PLAINTIFF

and

HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C.

By: _____

Donald L. Kahl, OBA #4855
Michele T. Gehres, OBA #10986
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74172
(918) 588-2700

ATTORNEYS FOR DEFENDANTS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 23 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

COPY

AMERICAN CENTRAL GAS COMPANIES, INC., a Delaware corporation, Plaintiff, v. PAUL E. JORNAYVAZ, an individual, and JEFFREY M. WEISER, an individual, Defendants.	Case No. 92-C-1091B (Consolidated with: Case No. 92-C-1092E Case No. 92-C-1148E Case No. 92-C-1149B)

JOINT STIPULATION OF DISMISSAL

AUG 24 1994

Plaintiff American Central Gas Companies, Inc., and defendants Paul E. Jornayvaz and Jeffrey M. Weiser, pursuant to Fed. R. Civ. P. 41, hereby stipulate that all claims asserted in the above-referenced consolidated actions are hereby dismissed with prejudice.

Respectfully submitted,

ALBRIGHT & RUSHER

By: _____

James W. Rusher, OBA #4855
Heath E. Hardcastle, OBA #14247
2600 Bank IV Center
15 West Sixth Street
Tulsa, Oklahoma 74172
(918) 583-5800

ATTORNEYS FOR PLAINTIFF

and

HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C.

By: _____

Donald L. Kahl, OBA #4855
Michele T. Gehres, OBA #10986
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74172
(918) 588-2700

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(Consolidated with:
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ENTERED ON DOCKET

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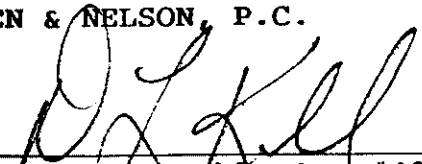
By: 

Donald L. Kahl, OBA #4855
Michele T. Gehres, OBA #10986
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74172
(918) 588-2700

ATTORNEYS FOR DEFENDANTS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MURPHY ENTERPRISES, INC.,

Plaintiff,

vs.

MATT ARMSTRONG SHOWS, a/k/a M.A.S., INC.,

Defendant.

Case No. 94-C-231-K

O R D E R

Now before the Court is the Motion of the Defendant Matt Armstrong Shows, a/k/a M.A.S., Inc. to Dismiss (Docket #2).

Plaintiff, Murphy Enterprises, Inc., (Murphy) brings this action against M.A.S. for breach of a contract to supply carnival rides at Septemberfest in Omaha, Nebraska. Murphy alleges that the contract was for a three year term beginning in 1992, and that M.A.S. fulfilled its obligation to provide carnival rides the first year of the contract, but failed to fulfill its obligation for the last two years of the contract. The Defendant, a Louisiana corporation, moves to dismiss, arguing that this Court does not have personal jurisdiction over it, that venue is improper in the Northern District of Oklahoma, and that process and service of process were insufficient.

Personal Jurisdiction

Defendant[1] argues that this Court does not have personal

[1] The Defendant states that there is no entity "Matt Armstrong Shows, a/k/a M.A.S., Inc." The Defendant states that Matt Armstrong Shows is the tradename for Matt Armstrong Shows, Inc., and that M.A.S., Inc. is a "totally separate corporation." The

jurisdiction over either Matt Armstrong Shows or M.A.S., Inc. In an action based on diversity jurisdiction, the Court must look to Oklahoma law for the basis of jurisdiction over a nonresident defendant. Fidelity & Casualty Co. of New York v. Philadelphia Resins Corp., 766 F.2d 440 (10th Cir. 1985). Under Oklahoma law, Oklahoma has jurisdiction over nonresidents who transact business in the state, limited only by the minimum due process requirements of the United States Constitution. Okla.Stat.tit. 12, §2004. The proper standard for determining jurisdiction is as follows:

> The plaintiff bears the burden of establishing personal jurisdiction over the defendant. Prior to trial, however, when a motion to dismiss for lack of jurisdiction is decided on the basis of affidavits and other written materials, the plaintiff need only make a prima facie showing. The allegations in the complaint must be taken as true to the extent they are uncontroverted by the defendant's affidavits. If the parties present conflicting affidavits, all factual disputes are resolved on the plaintiff's favor, and the plaintiff's prima facie showing is sufficient notwithstanding the contrary presentation by the moving party.

Williams v. Bowman Livestock Equipment Co., 927 F.2d 1128, 1131 (10th Cir. 1991)(quoting Behagen v. Amateur Basketball Association, 744 F.2d 731, 733 (10th Cir. 1984)).

The Plaintiff argues that this Court has personal jurisdiction over the Defendant because the Defendant negotiated the contract which is the basis of this lawsuit in Oklahoma. While Defendant disputes that assertion, it must be taken as true for the purpose of determining whether Plainitff makes a prima face showing of

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Defendant, however, asserts that both corporations are Louisiana corporations with their principle place of business in Louisiana.

personal jurisdiction. Williams, at 1131. While the issue of where the contract was negotiated is in dispute, it is agreed by the parties that the contract was executed in Las Vegas, and that performance was to be in Omaha. Therefore the issue before the Court is whether the negotiation of a contract in Oklahoma, which was not to be performed in Oklahoma, is sufficient to give rise to personal jurisdiction over the Defendant.

Oklahoma's longarm statute authorizes jurisdiction over a non-resident defendant as long as jurisdiction is consistent with the Due Process Clause. Kennedy v. Freeman, 919 F.2d 126, 128 (10th Cir. 1990). Jurisdiction may be either general or specific. General jurisdiction arises from continuous and systematic activity in the forum state. Id. Specific jurisdiction is based on minimum contacts with the forum state which give rise to the cause of action. To establish specific jurisdiction, which is alleged here, "the defendant must do some act that represents an effort by the defendant to 'purposefully avail[] itself of the privilege of conducting activities within the forum state.' A defendant does so when she purposefully directs her foreign acts so that they have an effect in the forum state." Id. (citations omitted). Purposeful availment depends on whether the Defendants contacts are attributable to his own actions or the actions of the Plaintiff. It requires "affirmative conduct by the defendant which allows or promotes the transaction of business within the forum state." Rambo v. American Southern Insurance Co., 839 F.2d 1415, 1420 (10th Cir. 1988).

Negotiation of a contract in the forum state is sufficient to constitute a basis for the exercise of in personam jurisdiction. Hoster v. Monongahela Steel Corp., 492 F.Supp. 1249 (10th Cir. 1980). In the present case, the Defendant purposefully directed acts to the forum state by appearing within the forum state and negotiating the contract upon which this claim is based. By undertaking these negotiations, it would be reasonable for the Defendant to expect to be sued in this state. Defendant's motion to dismiss on this basis is denied.

Improper Venue

Defendant argues that since the Court lacks personal jurisdiction, "it only follows that this Court is the improper venue for Plaintiff's action." Since the Court finds that there is personal jurisdiction, this argument is moot.

Insufficiency of Process and Service of Process

Defendant argues that service on M.A.S., Inc., (the only entity that was served) is insufficient service of process on Matt Armstrong Shows, Inc. Plaintiff counters that, since the letter which constitutes the breach of contract refers to M.A.S., Inc. d/b/a Matt Armstrong Shows, Defendant should not now be permitted to avoid proper service of process. The uncontroverted affidavits before the Court, however, demonstrate that any reference to M.A.S., Inc., as Matt Armstrong Shows was a mistake. The apparent proper Defendant is Matt Armstrong Shows d/b/a Matt Armstrong

Shows, Inc. The Plaintiff is given thirty days to amend the complaint to reflect this fact, and to serve the proper defendant.

Defendant's Motion to Dismiss is denied.

IT IS SO ORDERED THIS 22nd DAY OF AUGUST, 1994.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

VELMA WILLIAMS and ALLEN WILLIAMS, husband and wife,

Plaintiffs,

vs.

JOE HAMRA, d/b/a LEISURE VILLAGE HEALTH CARE CENTER,

Defendant.

Case No. 93-C-988-K

O R D E R

Now before the Court is the Motion of the defendant Joe Hamra d/b/a/ Leisure Village Health Care Center (Leisure Village) for Summary Judgment.

Plaintiff was employed at Leisure Village as an Administrative Assistant when she requested a paid maternity leave in early 1991. The request was granted, and she took the leave in September, 1991. When she had been gone for two weeks, Plaintiff was informed that she would not be paid for the remainder of the leave. Plaintiff made a complaint to the Equal Employment Opportunity Commission (EEOC). She was informed by the EEOC that once Leisure Village had started paying her for maternity leave, it could not stop paying her. Plaintiff then called her supervisor at Leisure Village to give her this information. The Supervisor discussed the matter with Mr. Hamra, called Plaintiff back, and told Plaintiff she would be paid for the remainder of her leave.

Plaintiff returned to work at the end of her six week leave. However, Plaintiff's son became ill in December, and Plaintiff

wanted to take the time off to be with him. Plaintiff was allowed to take her two weeks of paid vacation during this time. Plaintiff states that she was also told that she could have two or three weeks after the vacation time before she would be replaced. Plaintiff went into Leisure Village on January 3, 1992, the day after her vacation was over, to talk about a leave of absence, but was unable to meet with her supervisor. She was told on January 6, 1992 that she had been fired for no call, no show. There is a dispute whether Plaintiff was told to return to work on January 3, 1992, or told "not to worry about work."

Plaintiff has now sued for retaliation, violation of Oklahoma public policy, intentional infliction of emotional distress, misrepresentation and breach of contract. Defendant has filed this Motion for Summary Judgment on the claims for retaliation -- arguing that Plaintiff cannot prove a prima facie case; for intentional infliction -- arguing that there is no extreme and outrageous conduct; and for misrepresentation and breach of contract -- arguing that the facts do not support these claims.

Legal Analysis

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Windon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342 (10th Cir.

1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

> "The plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986).

Retaliatory Discharge

Plaintiff can establish a prima facie case of retaliation by showing (1) protected opposition to discrimination; (2) adverse action by the employer after the protected activity; and (3) a causal connection between the activity and the employer's action. Purrington v. University of Utah, 996 F.2d 1025, 1033 (10th Cir. 1993). Defendant argues that Plaintiff cannot show any protected opposition to discrimination, because she cannot prove that Defendant discriminated against her as to the maternity leave. In essence, Defendant is arguing that its decision not to pay Plaintiff after she had already taken off for maternity leave was not discriminatory because no one else had been allowed a paid leave. However, retaliation is prohibited whether it be for filing a complaint or expressing a belief that the employer has engaged in discriminatory practices. Cobb v. Anheuser Busch, Inc., 793 F.Supp. 1457, 1490 (E.D. Mo. 1990) The Court concludes that

Defendant's attempt to change its mind about payment is discrimination and that Plainitff's call to the EEOC was protected opposition.

Defendant also argues that there is no "causal connection" between the call to the EEOC and Plaintiff's termination. However, "[t]he causal connection may be demonstrated by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action." Purrington, 996 F.2d at p. 1033 (quoting Burrus v. United Telephone Co. of Kansas, Inc., 683 F.2d 339, 343 (10th Cir. 1982)). In this case, there is an inference of retaliation from the timing of the termination as well as the circumstances of the termination (i.e. finding "no call, no show" even though Plaintiff came in to the office on the day following her vacation, failure to tell Plaintiff of her termination at that time, and termination despite having told Plaintiff that she could have an additional two to three week leave after her vacation was up).

Once a Plaintiff establishes a prima facie case, Defendant must rebut the presumption of discrimination by producing some evidence of a legitimate nondiscriminatory reason for the termination. Sorensen v. City of Aurora, 984 F.2d 349, 352 (10th Cir. 1993). Here Defendant's legitimate non-discriminatory reason is Plaintiff's failure to show up or call on January 3, 1992.

Once Defendant has provided a nondiscriminatory reason for the termination, the Plaintiff must have the opportunity to demonstrate that the articulated reason is only pretext, Carey v. U.S. Postal

Service, 812 F.2d 621, 625 (10th Cir. 1987), or is not the true reason for termination. Purrington, 996 F.2d at 1033. Defendant argues that summary judgment is appropriate because Plaintiff does not and cannot make this showing. The Plaintiff's burden may be met "directly by demonstrating that a discriminatory reason actually motivated the [defendant], or indirectly by showing that the [defendant's] explanation is unworthy of credence." Carey, 812 F.2d at p. 626. Here, Plaintiff presents evidence that she was not told to come back into work on the third, that she in fact did go in to talk to the supervisor on the third, and that she had been told she would have two to three weeks after her vacation was over before she would need to be replaced. This evidence, if believed, casts doubt on the articulated reason for discharge. Thus, summary judgment on this claim is not appropriate.

Intentional Infliction of Emotional Distress

Defendant argues, that in order to establish a claim for intentional infliction of emotional distress, the conduct in question must be "beyond all possible bounds of decency" in the setting in which it occurred or "utterly intolerable in a civilized community." Eddy v. Brown, 715 P.2d 74, 77 (Okla. 1986). Only if reasonable men would differ in this assessment, should the claim be submitted to the jury. Id. Defendant argues that its actions in deciding not to pay plaintiff, particularly when no other employee had been given a paid maternity leave does not support a claim for intentional infliction of emotional distress. Plaintiff, on the other hand argues that the actionable conduct on the part of

Defendant was to have fired Plaintiff without any warning, after having promised her the time off, when her son was critically ill. Even considering these factual allegations, the Court does not find that this conduct is "beyond all possible bounds of decency." Defendants motion for summary judgment on this claim is granted.

Breach of Contract

Plaintiff claims that Defendant breached an oral contract when she was fired in spite of having been told that she would have two to three weeks after her vacation before she was replaced. However, Oklahoma is an employment-at-will state, Burk v. K-Mart Corp., 770 P.2d 24 (Oka. 1989), and Plaintiff did not have a specific contract of employment. Defendants motion on this claim is granted.

Misrepresentation

Plaintiff claims that Defendant promised her she could have an extended period of time off from work, and that this promise constitutes fraudulent misrepresentation. Fraudulent misrepresentation is:

> the creation of a false impression and damage sustained as a natural and probable consequence of the act charged, but the fraudulent representation need not be the sole inducement which causes a party to take the action from which the injury ensued; the key is that without the representation, the party would not have acted.

Tice v. Tice, 672 P.2d 1168, 1171 (Okla. 1983). Defendant claims that summary judgment is appropriate on this claim because there was no reliance on the representation since Plaintiff planned on staying with her child in the hospital no matter how long it took. Plaintiff, however, testified in her deposition that she would have

returned to work if she had known she would otherwise have lost her job. Thus, a question of fact exists as to this claim, and summary judgment is denied.

In summary, the Court denies Defendant's motion as to the claims for retaliation and misrepresentation, and grants the motion as to the claims for intentional infliction of emotional distress and breach of contract.

IT IS SO ORDERED THIS 22nd DAY OF AUGUST, 1994.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

EVA M. DANIELS, DONICE DANIELS, and ROY DANIELS,

Plaintiffs,

vs.

THE CITY OF KANSAS, OKLAHOMA; KANSAS POLICEMAN ALAN WILSON, personally and in his official capacity; DELAWARE COUNTY SHERIFF'S OFFICER VINCE SMITH, personally and in his official capacity; THE DELAWARE COUNTY BOARD OF COMMISSIONERS, EX REL; and VESPER CATRON,

Defendants.

Case No. 93-C-941-K

ORDER

Now before the Court is the Motion of the Defendants City of Kansas, Oklahoma (Kansas) and Alan Wilson (Wilson) for Summary Judgment (Docket #28).

Eva Daniels and Donice Daniels were employed at Kansas Movietime/Country Drive-in (Kansas Movietime), which was located on property owned by Vesper Catron (Catron) and leased to the proprietor of Kansas Movietime, Ron Daniel (Daniel). A landlord tenant dispute had arisen, and Catron and Daniel were involved in civil litigation. On March 3, 1993, Eva and Donice Daniels and Eva's Husband Roy Daniels were at Kansas Movietime when Vesper Catron entered the premises, began to pull computer wires out of their sockets, and threatened the Daniels with bodily harm. While Catron was still on the premises, Eva Daniels called the Delaware

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County Sheriff's Department.

Vince Smith (Smith), Sheriff's Officer, and Alan Wilson (Wilson), Kansas Policeman, were dispatched to the scene to investigate. When the officers arrived at Kansas Movietime, they spoke with Catron and then retreated to their cars and watched as Catron smashed the windows of the building at the drive-in. Apparently, they were under the impression that, since the building was owned by Catron, he had the right to damage the building if he wished.

Plaintiffs bring this claim under 42 U.S.C. §1983, alleging that, by Smith's and Wilson's failure to intervene or prevent the actions of Catron, they were deprived of their constitutional rights to freedom of expression, right to be free from unlawful seizure of the person, and their rights to due process of law. Plaintiffs also assert pendent claims for false imprisonment, assault and battery, abuse of process, negligence, gross negligence, and infliction of emotional distress. Kansas and Wilson seek summary judgment, arguing that there is no constitutional violation under the facts of this case, Wilson is entitled to qualified immunity, and Kansas and Wilson are exempt from suit on the pendent state tort claims.

Legal Analysis

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106

S.Ct. 2505, 91 L.Ed.2d 202 (1986); Windon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

> "The plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986).

§1983 Claim

42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

However, in order to state a §1983 cause of action there must be a violation of a constitutional right. Apodaca v. Rio Arriba County Sheriff's Department, 905 F.2d 1445 (10th Cir. 1990). Here, Plaintiffs allege that the officers violated their constitutional rights by failing to stop Catron once they arrived on the scene. Defendants argue that they are entitled to summary judgment on Plaintiffs' claim because Plaintiffs have no constitutional right

to the intervention of the officers.

In DeShaney v. Winnebago County Department of Social Services, 109 S.Ct. 998 (1989), the Court held that a child who had been beaten by his father did not have a constitutional right to intervention (being removed from the father's home) by social workers or local officials. That Court stated:

> [O]ur cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual. [Citations omitted.] . . . 'Although the liberty protected by the Due Process Clause affords protection against unwarranted *government* interference . . . , it does not confer an entitlement to such [governmental aid] as may be necessary to realize all the advantages of that freedom.' [Citations omitted.] . . . If the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them. As a general matter, then, we conclude that the State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.

Similarly, relying on DeShaney, the court in Bryson v. City of Edmond, 905 F.2d 1386 (10th Cir. 1990), held that the failure of the postmaster to train, supervise, examine, or afford medical care to a postal employee who injured and killed numerous co-workers during a shooting rampage at a post office did not violate any constitutional right.

Plaintiff argues that this case is distinguishable from DeShaney, because in this case the Defendants were aware of the dangers that Plaintiffs faced and "played a major role in the creation of the danger by doing nothing." The Deshaney Court,

however, rejected a similar argument that there was a duty to protect the abused plaintiff because the state knew of the danger of abuse and had specifically proclaimed its intention to protect the plaintiff from such abuse.

Lastly, Plaintiff argues that DeShaney stands for the proposition that, "in certain limited circumstances the Constitution imposes the state affirmative duties of care and protection. . . ." DeShaney, 109 S.Ct., at p. 1004. However, these limited circumstances exist when the state plays a part in the creation of the danger, Bryson, 905 F.2d, at p. 1393, or "affirmatively and directly" changes the status quo, as opposed to merely failing to intervene in a situation that is already happening. Medina v. City and County of Denver, 960 F.2d 1493, 1497, n. 5 (10th Cir. 1992). In the present case, the officers did not create the danger, Catron did. They also did not change the status quo, they simply refused to intervene, because they believed that Catron had the right to be doing what he was doing. The Court therefore finds that the facts do not support any constitutional violation, and summary judgment is granted on Plaintiff's §1983 claim.

Pendent State Claims

Kansas and Wilson also argue that they are immune from suit for torts under the Governmental Tortclaims Act, Okla.Stat.tit.51, §151 et seq. However, the court declines to address this argument. Since the federal claim has been dismissed, no independent jurisdiction exists for the state law claims. TV Communications

Network, Inc. v. Turner Network Television, Inc., 964 F.2d 1022, 1028 (10th Cir. 1992). "Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly if the federal claims are dismissed before trial . . . the state claims should be dismissed as well." United Mine Workers v. Gibbs, 86 S.Ct. 1130, 1139 (1966). See also 28 U.S.C. §1366(c). Therefore, Plaintiffs' pendent state claims are dismissed without prejudice.

In conclusion, the Court finds that summary judgment should be granted in favor of Defendants and against the Plaintiffs on the §1983 claims and that the pendent state law claims should be dismissed without prejudice.

IT IS SO ORDERED THIS 22nd DAY OF AUGUST, 1994.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BILLY JOE PEEK, Plaintiff,	)	
v.	)	No. 94-C-489-B
LIBERTY MUTUAL INSURANCE, COMPANY, Defendant.	)	(No CJ-94-01713) District Court of Tulsa County, Oklahoma

STIPULATION FOR DISMISSAL PURSUANT TO F.R.C.P. 41(A)(1)

It is hereby stipulated by Billy Joe Peek, Plaintiff, and Liberty Mutual Insurance Company, Defendant, that the above entitled action can be dismissed with prejudice for the reason that the Plaintiff has decided not to further pursue his claim and that the Defendant has agreed not to press for costs in this matter.

Respectfully submitted,

ATKINSON, HASKINS, NELLIS, BOUDREAUX, HOLEMAN, PHIPPS & BRITTINGHAM

Michael P. Atkinson, OBA #374
Galen L. Brittingham, OBA #12226
1500 ParkCentre
525 South Main
Tulsa, OK 74103-4524
Telephone: (918) 582-8877
Facsimile: (918) 585-8096

CLARK AND STAINER, P.C.

By:

Joseph F. Clark, Jr., OBA #1706
406 S. Boulder, Suite 600
Tulsa, OK 74103
(918) 584-6404

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. JOHN W. RUTHERFORD; CARMEN L. RUTHERFORD; JOHN E. MAEHR; MARY MAEHR; STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION; HILLCREST MEDICAL CENTER; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	)	CIVIL ACTION NO. 94-C 420E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 23 day of August, 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, appears by Kim D. Ashley, Assistant General Counsel; the Defendant, **Hillcrest Medical Center**, appears by its attorney, Daniel M. Webb; and the Defendants, **John W. Rutherford, Carmen L. Rutherford, John E. Maehr, and Mary Maehr**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendants, **John W. Rutherford and Carmen L. Rutherford**, waived service of Summons on May 10, 1994,

which was filed May 12, 1994; that the Defendants, **John E. Maehr and Mary Maehr**, waived service of Summons on May 21, 1994, which was filed on May 24, 1994; that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission,** acknowledged receipt of Summons and Complaint via certified mail on April 28, 1994; and that the Defendant, **Hillcrest Medical Center**, waived service of Summons on April 28, 1994, which was filed on April 29, 1994.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on May 12, 1994; that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, filed its Answer on May 18, 1994; that the Defendant, **Hillcrest Medical Center,** filed its Answer on May 5, 1994; and that the Defendants, **John W. Rutherford, Carmen L. Rutherford, John E. Maehr, and Mary Maehr**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> **LOT THIRTY-THREE (33), BLOCK ONE (1), SANS SOUCI ADDITION TO THE CITY OF TULSA, TULSA COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.**

The Court further finds that on June 20, 1980, John Erling L. Frette, executed and delivered to FIRST CONTINENTAL MORTGAGE CO. his mortgage note in the amount of $60,200.00,

payable in monthly installments, with interest thereon at the rate of eleven and one-half percent (11.5%) per annum.

The Court further finds that as security for the payment of the above-described note, John Erling L. Frette, a single person, executed and delivered to FIRST CONTINENTAL MORTGAGE CO. a mortgage dated June 20, 1980, covering the above-described property. Said mortgage was recorded on June 30, 1980, in Book 4482, Page 431, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 26, 1987, COMMONWEALTH SAVINGS ASSOCIATION successor by merger to FIRST CONTINENTAL MORTGAGE CO. assigned the above-described mortgage note and mortgage to COMMONWEALTH MORTGAGE COMPANY OF AMERICA L.P. This Assignment of Mortgage was recorded on June 16, 1987, in Book 5031, Page 450, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 16, 1990, COMMONWEALTH MORTGAGE COMPANY OF AMERICA, L.P., assigned the above-described mortgage note and mortgage to THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT OF WASHINGTON, D.C., his successors and assigns. This Assignment of Mortgage was recorded on February 26, 1990, in Book 5238, Page 538, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, John W. Rutherford and Carmen L. Rutherford, currently hold the fee simple title to the property by virtue of a Warranty Deed dated July 20, 1987, and recorded on July 21, 1987 in Book 5040, Page 1668, in the records of Tulsa County, Oklahoma; and the

Defendants, John W. Rutherford and Carmen L. Rutherford, are the current assumptors of the subject indebtedness.

The Court further finds that on September 1, 1989, the Defendants, John W. Rutherford and Carmen L. rutherford, husband and wife, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on June 1, 1991.

The Court further finds that the Defendants, John W. Rutherford and Carmen L. Rutherford, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, **John W. Rutherford and Carmen L. Rutherford**, are indebted to the Plaintiff in the principal sum of $91,972.76, plus interest at the rate of 11.5 percent per annum from April 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $81.00 which became a lien on the property as of June 25, 1993; a lien in the amount of $37.00 which became a lien on June 25, 1993; a claim against he subject property in the amount of $80.00 for the tax year 1993; and a

claim against the subject property in the amount of $37.00 for the tax year 1993. Said liens and claims are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, has a lien on the property which is the subject matter of this action by virtue of state taxes in the amount of $190.50, plus interest, penalties, and costs, which became a lien on the property as of May 19, 1989. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Hillcrest Medical Center**, has a lien on the property which is the subject matter of this action by virtue of a judgment against the Defendants, John W. Rutherford and Carmen L. Rutherford, in the amount of $1,380.75 with interest accruing at 11.71 percent from April 16, 1991, which became a lien on the property on April 17, 1991. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, claims no right, title or interest in the subject real property

The Court further finds that the Defendants, **John W. Rutherford, Carmen L. Rutherford, John E. Maehr, and Mary Maehr**, are in default, and have no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all

instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendants, **John W. Rutherford and Carmen L. Rutherford**, in the principal sum of $91,972.76, plus interest at the rate of 11.5 percent per annum from April 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.67 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of $235.00 for personal property taxes for the years 1992 and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, have and recover judgment in rem in the amount of $190.50, plus penalties and interest, for state taxes.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **Hillcrest Medical Center**, have and recover judgment in the amount of $1,380.75, plus and interest, for a judgment.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **John W. Rutherford, Carmen L. Rutherford, John W. Maehr, Mary Maehr and Board of County Commissioners, Tulsa County, Oklahoma**, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, **John W. Rutherford and Carmen L. Rutherford**, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of the Defendant, State of Oklahoma ex rel Oklahoma Tax Commission, in the amount of $190.50, plus accrued and accruing interest for state taxes which are currently due and owing.

Fourth:

In payment of the Defendant, Hillcrest Medical Center, in the amount of $1,380.75, plus interest, for a judgment.

Fifth:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of $235.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

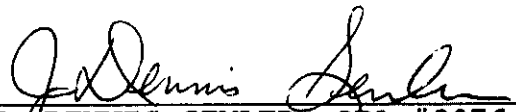
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ JAMES O. ELLISON

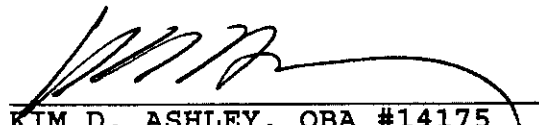
UNITED STATES DISTRICT JUDGE

APPROVED:
STEPHEN C. LEWIS
United States Attorney

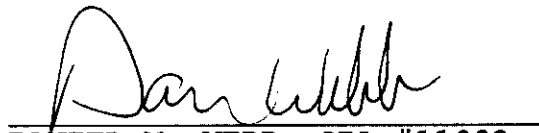
NEAL B. KIRKPATRICK
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



J. DENNIS SEMLER, OBA #8076
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4841
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma



KIM D. ASHLEY, OBA #14175
Assistant General Counsel
P.O. Box 53248
Oklahoma City, OK 73152-3248
(405) 521-3141
Attorney for Defendant,
State of Oklahoma ex rel
Oklahoma Tax Commission



DANIEL M. WEBB, OBA #11003
WORKS & LENTZ, INC.
Mapco Plaza Building
1717 South Boulder, Suite 200
Tulsa, OK 74119
(918) 582-3191
Attorney for Defendant,
Hillcrest Medical Center

Judgment of Foreclosure
Civil Action No. 94-C 420E
NBK:lg

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

JIM AND LOUISE HOOD, DON LEMASTER, PHILIP AND REITAGAY WILKERSON, d/b/a COLONIAL PORT MOBILE HOME PARK, a general partnership,

Plaintiffs,

vs.

FIRST FINANCIAL INSURANCE COMPANY, a North Carolina Company JOHNSON CLAIMS SERVICE, INC., an Oklahoma Corporation, ROGERS AND ROGERS ASSOCIATES INSURANCE AGENCY, INC., an Oklahoma Corporation,

Defendants.

Case No. 93-C-1055-K

ORDER OF DISMISSAL WITH PREJUDICE

NOW ON this 22 day of August, 1994, the above-styled and numbered cause coming on for hearing before the undersigned Judge of the United States District Court in and for the ~~Western~~ Northern District of Oklahoma, upon the Joint Stipulation for Dismissal of Plaintiff and Defendant herein; and the Court, having examined the pleadings and being well and fully advised in the premises, is of the opinion that said cause should be dismissed with prejudice to its refiling.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above-styled and numbered cause be and the same is hereby dismissed with prejudice to its refiling.

Jerry C. Kern

UNITED STATES DISTRICT JUDGE

1333\011-14

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE AUG 23 1994

JULIE WARDEN,

Plaintiff,

vs.

THE CITY OF SAPULPA, OKLAHOMA, an Oklahoma Municipal Corporation, and ROBERT HIGHTOWER,

Defendants.

No. 93-C-798-K

FILED

Clerk

ORDER OF DISMISSAL WITH PREJUDICE

Upon consideration of the Stipulation Of Dismissal With Prejudice filed in this matter, the Court hereby ORDERS that this cause should be and is hereby dismissed with prejudice.

DATED this 22 day of ~~July~~ Aug, 1994.

Honorable Terry C. Kern
United States District Judge

OM-WARDEN\P09-APPL.WD
APPLICATION TO WITHDRAW AS ATTORNEY AND TO SUBSTITUTE NEW COUNSEL

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOSEPH E. and MARY FRANCES HOWELL,

Plaintiff,

v.

BURLINGTON MOTOR CARRIERS, and DONNIE RAY WHITLEY,

Defendants.

No. 94-C-46-K

ORDER OF DISMISSAL WITH PREJUDICE

Upon representation of the parties, the Court finds that all issues existing between the parties have been compromised and settled and that the claims of the Plaintiffs herein against the named Defendants should be and the same are hereby dismissed with prejudiced.

DATED this 22 day of August, 1994.

Jerry C. Kern
U. S. District Judge

Copies to:

Mr. Richard D. Mosier
Mr. Richard Carpenter

ENTERED ON DOCKET

DATE AUG 23 1994

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

LIDA NATIONAL YELLOW PAGES SERVICE, a Missouri Corporation,

Plaintiff,

vs.

GREGORY A. MORRIS, *et al.*,

Defendants.

Case No. 93-C-1043-K

ORDER ADMINISTRATIVELY CLOSING CASE

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore, it is not necessary that the action remain upon the calendar of the Court.

IT THEREFORE ORDERED, that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen this action upon cause shown that the settlement has not been completed and further litigation is necessary.

ORDERED this 22 day of August, 1994.

UNITED STATES ~~MAGISTRATE~~ JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

EVELYN CONDREAY and
BOB CONDREAY,

Plaintiffs,

-vs-

FARMERS INSURANCE COMPANY,
INC.,

Defendant.

No. 93-C-908-K

ORDER

NOW on this 22 day of August, 1994, plaintiffs' Application to Dismiss with Prejudice came on for hearing. The Court being fully advised in the premises finds that said Application should be sustained and the defendant, should be dismissed from the above entitled action with prejudice.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that plaintiffs' Application to Dismiss With Prejudice be sustained and the above captioned action be dismissed with prejudice as to defendant.

s/ TERRY C. KERN

JUDGE TERRY C. KERN
JUDGE OF THE UNITED STATES
DISTRICT COURT FOR THE
NORTHERN DISTRICT

ENTERED ON DOCKET

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA DATE AUG 23 1994

DAVID BEN FINDLEY,

Plaintiff,

vs.

KIMBALL'S PRODUCE, INC., an Oklahoma Corporation,

Defendant.

Case No. 94-CV-493-K

FILED

ORDER OF DISMISSAL WITH PREJUDICE
AND
ORDER OF CONFIDENTIALITY

Now on this 22 day of August, 1994, the above styled and numbered matter comes on before this Court pursuant to Stipulation for Order of Dismissal filed herein by the parties hereto. Upon consideration of such Joint Stipulation for Dismissal the Court finds that the above styled and numbered matter should be dismissed with prejudice to the refiling of same. Further, the Court, based upon such Joint Stipulation of Dismissal finds that an Order of Confidentiality should be entered whereby both parties to this proceeding when referring to the resolution of this proceeding shall state only "the matter has been resolved".

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the foregoing findings be and same hereby are made Orders of this Court as if fully set forth hereinafter.

/s/ TERRY C. KERN

The Honorable Terry C. Kern
United States District Judge

2891-1.od

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

COLLEEN WHITEHEAD, an individual, and as a representative of unknown members of the class,

Plaintiffs,

vs.

OKLAHOMA GAS AND ELECTRIC, an Oklahoma corporation; OKLAHOMA GAS AND ELECTRIC RETIREMENT PLAN, a qualified retirement plan trust; and H.L. GROVER, IRMA ELLIOT, RON SCHMID, in their capacities as members of the Oklahoma Gas and Electric Retirement Plan Committee,

Defendants.

Case No. 94-C-682-K

O R D E R

Now before the Court is the Motion of the Defendants, Oklahoma Gas and Electric, Oklahoma Gas and Electric Retirement Plan, H.L. Grover, Irma Elliot, and Ron Schmid (collectively, "OG&E") For Judgment on the Pleadings and to Dissolve the Temporary restraining Order (Docket #16).

Plaintiff makes the following factual allegations in her petition which are assumed to be true for the purposes of this motion. Plaintiff was first hired by OG&E on June 3, 1957. On September 5, 1969, she was involuntarily terminated due to her pregnancy. At that time she lost all seniority and benefits for her prior service and all her contributions to the retirement plan were returned to her. Plaintiff was rehired as a permanent full-time employee on July 16, 1973.

On May 20, 1994 OG&E offered its employees who were at least

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50 years of age and had at least five years of service with the company, including Plaintiff, an early retirement program. The offer credited Plaintiff with service from 1973 to the present but not for the years prior to that. The offers to all of OG&E's eligible employees did not give them credit for their years prior to any break in service, regardless of the cause. The offer was conditioned on releasing OG&E from all claims the employee might have for additional benefits.

Plaintiff requested a reconsideration of her retirement benefits in order that she would receive credit for her years of service prior to her break in service. Her request to "bridge" her break in service was denied, and she was informed of her right to appeal the denial before the Retirement Committee within 60 days. Additionally the Retirement Committee denied her request that the offer remain open pending exhaustion of her administrative remedies.

The offer was set to expire on July 8, 1994. On that date, Plaintiff filed a petition in state court, on behalf of herself and others similarly situated, which included claims for intentional infliction of emotional distress, sex discrimination in Violation of Title VII, including the Pregnancy Discrimination Act of 1978, and the Oklahoma antidiscrimination statute, breach of fiduciary duty in violation of the Employee Retirement Income Security Act (ERISA), violation of the ERISA minimum vesting standards, and

denial of property without due process of law.[1] On that date, Plaintiff secured a Temporary Restraining Order, preventing the Defendants from "withdrawing the offer of employment benefits to Whitehead and others similarly situated on July 8, 1994 at 4:00 p.m. until such time as the above hearing on the matter is held or a trial by jury." This Court has entered a preliminary injunction and determined that "others similarly situated," based on the Petition on file, includes only employees with a break in service due to pregnancy, who have been denied years of service under the Early Retirement Window program earned prior to the break in service. Defendants now move for judgment on the pleadings, arguing that the Petition fails to state a claim for relief, and that the preliminary injunction should be dissolved.

Legal Analysis

When considering a motion to dismiss, the complaint must be construed in favor of plaintiff, accepting all material allegations as true. Ash Creek Mining Co. v. Lujan, 969 F.2d 868, 870 (10th Cir. 1992). A motion to dismiss should be granted if "it appears beyond doubt that the plaintiff could prove no set of facts entitling it to relief." Id.

Discrimination Claim

Defendant argues that the sex discrimination claims should be dismissed because they are barred by the statute of limitations. Defendant's position is that any "discrimination" against plaintiff

[1] The last claim, for denial of property without due process of law, was withdrawn by plaintiff in her response brief, and is therefore dismissed.

occurred when she was forced to resign because of her pregnancy, in September, 1969. Thus, any claim of discrimination would be barred by the statute of limitations.

Plaintiff argues, however, that defendant mischaracterizes her claim. In her response brief, Plaintiff states: "The plaintiffs are describing a present act of discrimination, consisting of the defendants' miscalculation of benefits, based upon discriminatory and unlawful policies of the past. The denial of benefits by the defendants is occurring now." She argues that her discrimination claim is based on a present injury that results from a present decision to deny her years of service for retirement and discriminate based on her 1969 pregnancy.

In making a distinction between past and present discrimination, Plaintiff relies on Pallas v. Pacific Bell, 940 F.2d 1324 (9th Cir. 1991). In Pallas, plaintiff was determined not to be eligible for early retirement because she did not have the required length of service to qualify. Plaintiff was denied these benefits in 1987 because of a method of calculating employee service time that does not credit pregnancy leaves taken prior to 1979, but credits temporary disability taken during the same period. In finding that the claim was not barred by the statute of limitations, the Court found that the plaintiff "challenges the criteria adopted in 1987 to determine eligibility for the new benefit program," and that the benefit program "distinguishes between similarly situated employees: female employees who took leave prior to 1979 due to a pregnancy-related disability and

employees who took leave prior to 1979 for other temporary disabilities." Id., at p. 1327. Based on these facts, the court held: "While the act of discriminating against Pallas in 1972 is not, itself, actionable, Pacific Bell is liable for its decision to discriminate against Pallas in 1987 on the basis of pregnancy."

The Court finds, however, that Pallas is factually distinguishable from the present case, and that United Air Lines, Inc. v. Evans, 97 S.Ct. 1885 (1977) is more applicable to these facts. In Evans, plaintiff was forced to resign in 1968 when she got married, and was rehired in 1972 as a new employee. When she was rehired, she was treated as though she had no prior service with United. She sued in order to be credited with her pre-1972 seniority. Evans recognized that a claim based on an unlawful employment practice in 1968 would be untimely, but argued that the failure to credit her with the pre-termination seniority gave "present effect to the past illegal act and therefore perpetuate[d] the consequences of forbidden discrimination." Id., at p. 1888. In rejecting this argument, the Court stated:

> Respondent emphasizes the fact that she has alleged a continuing violation. United's seniority system does indeed have a continuing impact on her pay and fringe benefits. But the emphasis should not be placed on mere continuity; the critical question is whether any present violation exists. She has not alleged that the system discriminates against former female employees or that it treats former employees who were discharged for a discriminatory reason any differently from former employees who resigned or were discharged for a non-discriminatory reason. In short, the system is neutral in its operation.

Id., at p. 1889. The Court agreed that the seniority system gave present effect to past discrimination, but held that present effect

was not a present violation which could give rise to a timely claim.

In the present case, the only discriminatory action was the termination of Plaintiff's job when she became pregnant. There was no present decision to treat a gap in employment due to pregnancy any differently from a gap in employment based on any other reason as there was in Pallas. In this case, as in Evans, the present effect of the past discrimination is the result of a neutral system that does not treat employees who were discharged (or resigned) for a discriminatory reason any differently than employees who were discharged (or resigned) for a non-discriminatory reason. Thus, the present effect of the past discrimination is not actionable, and a claim based on the past discrimination is barred by the statute of limitations. Plaintiff's claims under Title VII, the Pregnancy Discrimination Act of 1978, and the Oklahoma antidiscrimination[2] act are all barred by the Statute of Limitations and Defendants' Motion to Dismiss these claims is granted.

ERISA Breach of Fiduciary Duty Claim

Defendants also assert that Plaintiff has not properly alleged an ERISA claim. Defendants argue that Plaintiff does not state a

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[2] Plaintiff asserts in her Response Brief that "[a]dditionally, the plaintiffs are entitled to relief under the Oklahoma statutes based on age discrimination claims which plaintiffs would allege arising from the invalidation of the 'early retirement window' programs because of lack of voluntariness and sufficient notice." However, the Court will not consider this argument because Plaintiff did not plead an age discrimination claim in her Petition.

claim for breach of fiduciary duty because Plaintiff seeks damages for herself and not for the plan, that the facts alleged by Plaintiff do not support an ERISA claim, and that Plaintiff has failed to exhaust the administrative remedies under the ERISA plan. For her ERISA claim, the Plainitff merely asserts the Defendants breached their fiduciary duties by failing to give credit to Plaintiff for years of service prior to a forced pregnancy termination. This assertion does not state a claim under 29 U.S.C. §1109, which provides in part:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

(Emphasis added). The principal statutory duties of the trustees "relate to the proper management, administration, and investment of fund assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest." Massachusetts Mutual Life Insurance Company v. Russell, 105 S.Ct. 3085, 3090 (1985). Thus, the breach alleged by Plaintiff is not of a fiduciary duty contemplated by §1109. Additionally, while Plaintiff asserts that she has "described the manner in which the present denial of benefits by the defendants violates the explicit terms of the summary plan descriptions," these allegations are not contained in the Petition, and these allegations do not assert a claim for breach of fiduciary duty.

Moreover, a claim for breach of fiduciary duty does not give rise to an award of damages to beneficiaries of the Plan. In finding that §1109 did not provide for a claim for extracontractual damages for a delay in making payments under a plan, the Russell Court stated:

> To read directly from the opening clause of §409(a)[3], which identifies the proscribed acts, to the "catchall" remedy phrase at the end - skipping over the intervening language establishing remedied benefitting, in the first instance, solely the plan - would divorce the phrase being construed from its context and construct an entirely new class of relief available to entities other than the plan.

Id. (emphasis added). The Court concluded that "the entire text of §409 persuades us that Congress did not intend that section to authorize any relief except for the plan itself." Id., at p. 3091. Thus, Plaintiff's bald assertion that the entire plan will benefit from her claim[4] ignores the fact that the statute creates only a remedy for the plan and not for individual beneficiaries, and that Plaintiff, in her ERISA claim, requests damages which "will approximate the amount of benefits due" as well as punitive damages. Defendants' Motion to Dismiss Plaintiff's ERISA claim for breach of fiduciary duty is granted.

ERISA Breach of Minimum Vesting Standards Claim

Plaintiffs also claim that the denial of benefits violates 26

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[3] 29 U.S.C. §1109(a).

[4] In her response brief, Plaintiff asserts that "[w]hile each of the plaintiffs would individually benefit from successful prosecution of this case, the lawsuit will ultimately benefit the Plan by requiring the defendants to follow the law and the express provisions of the Summary Plan Description."

U.S.C. §§401, 411(d), and 501(a). Defendant, relying on Spilky v. Helphand, 1193 U.S. Dist. LEXIS 6196 (S.D.N.Y. May 10, 1993) and Cort v. Ash, 95 S.Ct. 2080 (1975), argues that the sections of the Internal Revenue code relied on by Plaintiff do not create or attach to a private right of action. Plaintiff does not dispute that there is no private right of action under §§401, 411(d), and 501(a), but rather argues that these provisions are also found in ERISA, and that ERISA provides that a civil action may be brought by a participant or beneficiary of a plan to enjoin any act or practice which violates ERISA. However, Plaintiff's fourth claim does not contain any allegation of violations of ERISA, but rather contains allegations of violations of the Internal Revenue Code for which there is no private right of action. Defendants' Motion to Dismiss this claim is granted.

Intentional Infliction of Emotional Distress

Defendant argues that Plaintiff's claim for intentional infliction of emotional distress is preempted by ERISA and not supported by the facts. ERISA supersedes "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. §1144(a). "[C]ommon law tort and breach of contract claims are preempted by ERISA if the factual basis of the cause of action involves an employee benefit plan." Settles v. Golden Rule Ins. Co., 927 F.2d 505, 509 (10th Cir. 1991). Here there is no question but that the "factual basis of the cause of action involves an employee benefit plan," and Plaintiff does not argue to the contrary.

Plaintiff, in fact agrees that the claim may be preempted, but argues that since defendants contend that ERISA does not apply, Plaintiff should be entitled to plead the emotional distress claim as an "alternate theory." However, the Defendants do not argue, and the Court does not hold, that ERISA does not apply, but that Plaintiff has not properly pled an ERISA claim, and that the facts do not support an ERISA claim for breach of fiduciary duty. Defendants Motion to Dismiss Plaintiffs claim for intentional infliction of emotional distress in granted.

In summary, the Court finds that Defendants' Motion to Dismiss as to each of Plaintiff's claims should be granted. Plaintiff is given twenty days from the date of this Order to Amend her Complaint to state a claim for which relief can be granted.

IT IS SO ORDERED THIS 22nd DAY OF AUGUST, 1994.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DAVID KNIGHT,

Plaintiff,

vs.

KIMBALL'S PRODUCE, INC., an Oklahoma Corporation,

Defendant.

Case No. 94-CV-495-K

ORDER OF DISMISSAL WITH PREJUDICE
AND
ORDER OF CONFIDENTIALITY

Now on this 22 day of August, 1994, the above styled and numbered matter comes on before this Court pursuant to Stipulation for Order of Dismissal filed herein by the parties hereto. Upon consideration of such Joint Stipulation for Dismissal the Court finds that the above styled and numbered matter should be dismissed with prejudice to the refiling of same. Further, the Court, based upon such Joint Stipulation of Dismissal finds that an Order of Confidentiality should be entered whereby both parties to this proceeding when referring to the resolution of this proceeding shall state only "the matter has been resolved".

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the foregoing findings be and same hereby are made Orders of this Court as if fully set forth hereinafter.

S/ TERRY C. KERN

The Honorable Terry C. Kern
United States District Judge

2891-1.od

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE AUG 23 1994

RANDY JOE HILTON,

Plaintiff,

vs.

KIMBALL'S PRODUCE, INC., an Oklahoma Corporation,

Defendant.

Case No. 94-CV-494-K

FILED

ORDER OF DISMISSAL WITH PREJUDICE
AND
ORDER OF CONFIDENTIALITY

Now on this 22 day of August, 1994, the above styled and numbered matter comes on before this Court pursuant to Stipulation for Order of Dismissal filed herein by the parties hereto. Upon consideration of such Joint Stipulation for Dismissal the Court finds that the above styled and numbered matter should be dismissed with prejudice to the refiling of same. Further, the Court, based upon such Joint Stipulation of Dismissal finds that an Order of Confidentiality should be entered whereby both parties to this proceeding when referring to the resolution of this proceeding shall state only "the matter has been resolved".

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the foregoing findings be and same hereby are made Orders of this Court as if fully set forth hereinafter.

TERRY C. KERN

The Honorable Terry C. Kern
United States District Judge

2891-1.od

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DIANE CUENOD, et al.,

Plaintiffs,

vs.

TULSA POLICE DEPT., et al.

Defendants.

No. 93-C-1009-K

ORDER

By Order entered August 1, 1994, the Court gave plaintiff until August 10, 1994 to effect proper service upon the defendants or face dismissal pursuant to Rule 4(m) F.R.Cv.P.. The deadline has passed and the record does not reflect that proper service has been effected or that plaintiff has demonstrated good cause for the failure.

It is the Order of the Court that the above-styled case is hereby dismissed without prejudice.

ORDERED this 22nd day of August, 1994.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

3

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TERRY A. JENKINS, an individual,

Plaintiff,

vs.

No. 94-C-195 E

GREEN BAY PACKAGING, INC., a Wisconsin Corporation, GEORGE KRESS, Director, MARGUERITE KRESS, Director, JAMES F. KRESS, Director, DONALD F. KRESS, Director, MARILYN KRESS SWANSON, Director, L. EDWARD SCHMIDT, Director, FRANCIS E. FERGUSON, Director, KENNETH MORRISON, Director, JAMES G. WIGDALE, Director, WAYNE J. ROPER, Director, FRED WAKEMAN, Executive Vice-President of Converting, RICHARD P. LASTER, Vice-President and General Manager of Southwest Plant, Tulsa Division,

Defendants.

PREFERRED PACKAGING, INC., an Oklahoma Corporation,

Plaintiff,

vs.

No. 94-C-196 E

GREEN BAY PACKAGING, INC., a Wisconsin Corporation, GEORGE KRESS, Director, MARGUERITE KRESS, Director, JAMES F. KRESS, Director, DONALD F. KRESS, Director, MARILYN KRESS SWANSON, Director, L. EDWARD SCHMIDT, Director, FRANCIS E. FERGUSON, Director, KENNETH MORRISON, Director, JAMES G. WIGDALE, Director, WAYNE J. ROPER, Director, FRED WAKEMAN, Executive Vice-President of Converting, RICHARD P. LASTER, Vice-President and General Manager of Southwest Plant, Tulsa Division,

Defendants.

MARK A. WOJCIEHOWSKI, an individual,

Plaintiff,

vs.) No. 94-C-197 E

GREEN BAY PACKAGING, INC., a Wisconsin Corporation, GEORGE KRESS, Director, MARGUERITE KRESS, Director, JAMES F. KRESS, Director, DONALD F. KRESS, Director, MARILYN KRESS SWANSON, Director, L. EDWARD SCHMIDT, Director, FRANCIS E. FERGUSON, Director, KENNETH MORRISON, Director, JAMES G. WIGDALE, Director, WAYNE J. ROPER, Director, FRED WAKEMAN, Executive Vice-President of Converting, RICHARD P. LASTER, Vice-President and General Manager of Southwest Plant, Tulsa Division,)

Defendants.

O R D E R

It was the Court's intent to enter its ruling on Plaintiff's Motion to Remand in June, 1994. Due to a scrivener's error, however, that Order was not issued. Thus, the Court hereby issues its Order as appears below.

The Court has for consideration Plaintiff's Motion to Remand. Plaintiff has filed suit for malicious prosecution. Defendants are all citizens of Wisconsin, with the exception of Richard P. Laster. Laster, an Oklahoma citizen, is a Vice-President of Green Bay Packaging and is General Manager of the Tulsa Plant, Southwest Division, of Green Bay Packaging. Defendants removed from state court in Creek County to this Court. Plaintiff has moved to remand back to state court.

Oklahoma law governs the substance of the malicious prosecution claims. Before the substance of the claims can be considered, however, it must be determined if joinder of Defendant

Laster was procedurally correct. A plaintiff may join a non-diverse defendant to defeat the non-resident defendant's right to remove.

> However, should the non-resident defendant choose to remove and all other jurisdictional requisites are met, it can submit to the court that the joinder of the resident defendant was a "fraudulent joinder" to defeat diversity. Where the removing defendant pleads fraudulent joinder it must support its claim with clear and convincing evidence.

Town of Freedom, Oklahoma v. Muskogee Bridge Co., Inc., 466 F.Supp 75, 78 (W.D. Okla. 1978).

The standard of proof for fraudulent joinder of a defendant is equivalent to that required for a motion to dismiss. Winton v. Moore, 288 F. Supp. 470, 471 (N.D. Okla. 1968). Plaintiff must state a valid cause of action against the non-diverse defendant. Defendant must provide clear and convincing evidence on which a summary determination that there is no factual basis for Plaintiff's cause of action against the non-diverse defendant could be made. Winton at 472. These issues of fact must be capable of summary determination, as opposed to any pre-trial of doubtful issues of fact. Id., citing Dodd v Fawcett Pub. Co., 329 F.2d 82 (10th Cir. 1964). The joinder is not fraudulent if there is doubt as to whether the plaintiff has stated a cause of action against the non-diverse defendant. Town of Freedom at 78. "Where any substantial doubt concerning this Court's jurisdiction exists, the case should be remanded." Hart v. Wendling, 505 F.Supp. 52, 53 (W.D. Okla. 1980).

Plaintiff has asserted a claim of malicious prosecution

against a non-diverse defendant. Under Oklahoma law, malicious prosecution requires plaintiffs to affirmatively prove five elements: "(1) the bringing of the original action by the defendant; (2) its successful termination in plaintiff's favor; (3) want of probable cause to join the plaintiff; (4) malice, and (5) damages." Young v. First State Bank, Watonga, 628 P.2d 707 (Okl. 1981), citing Towne v. Martin, 166 P.2d 98 (Okl. 1946).

Successful termination of the prior action has been proven beyond controversy. Doubt exists as to the remaining elements, but this doubt has not been proven by the Defendants to the standard of clear and convincing evidence. Thus, there is a lack of diversity of citizenship between the parties, as Plaintiff is an Oklahoma citizen and Defendant Laster is an Oklahoma citizen. The Court finds and concludes that it is without jurisdiction of this action, and that the case should be remanded to the state court from which it was removed.

Plaintiff's Motion to Remand is GRANTED.

ORDERED this 22d day of August, 1994.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TERRY A. JENKINS, an individual,

Plaintiff,

vs.

No. 94-C-195 E

GREEN BAY PACKAGING, INC., a Wisconsin Corporation, GEORGE KRESS, Director, MARGUERITE KRESS, Director, JAMES F. KRESS, Director, DONALD F. KRESS, Director, MARILYN KRESS SWANSON, Director, L. EDWARD SCHMIDT, Director, FRANCIS E. FERGUSON, Director, KENNETH MORRISON, Director, JAMES G. WIGDALE, Director, WAYNE J. ROPER, Director, FRED WAKEMAN, Executive Vice-President of Converting, RICHARD P. LASTER, Vice-President and General Manager of Southwest Plant, Tulsa Division,

Defendants.

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MARK A. WOJCIEHOWSKI, an individual,

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vs.	)	No. 94-C-197 E
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O R D E R

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Laster was procedurally correct. A plaintiff may join a non-diverse defendant to defeat the non-resident defendant's right to remove.

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Plaintiff's Motion to Remand is GRANTED.

ORDERED this 22d day of August, 1994.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TERRY A. JENKINS, an individual,

Plaintiff,

vs. No. 94-C-195 E

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PREFERRED PACKAGING, INC., an Oklahoma Corporation,

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vs. No. 94-C-196 E

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8

vs.	)	No. 94-C-197 E
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Plaintiff's Motion to Remand is GRANTED.

ORDERED this 22d day of August, 1994.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHRISTOPHER WALKER,

Plaintiff,

vs.

PAUL O'KEEFE and THE CITY OF HOMINY,

Defendant.

CASE NO. 94-C-602-B

ORDER

This matter comes on for consideration of Defendants', Paul O'Keefe (O'Keefe) and The City Of Hominy (City), Motion To Dismiss (docket entry # 6). This is a civil rights/wrongful discharge case removed here from the District Court for Osage County, Oklahoma.

Defendants raise five propositions in support of their Motion, which are:

(1) If this action is a Title VII claim under the Civil Rights Act of 1964, 42 U.S.C. §2000(e) *et seq*, Plaintiff has failed to exhaust his administrative remedies, a jurisdictional prerequisite to filing such a suit. Brown v. Hartshorne Public School District No. 1, 864 F.2d 680 (10th Cir. 1988); Brown v. General Services Administration, 425 U.S. 820 (1976).

Plaintiff responds that his claims are not Title VII claims notwithstanding that his state court Petition pled the Civil Rights Act of 1964.

To the extent Plaintiff's Complaint (Petition) pleads a Title VII claim, if it does, the Court concludes that such claim should be and the same is herewith DISMISSED without prejudice.

(2) and (3) Plaintiff's 42 U.S.C. §1983 and § 1981 claims are barred by the statute of limitations (two years). Plaintiff alleges he was terminated by the City on or about May 9, 1990, because he is a member of the Negro race. Defendant argues that the present action, filed December 7, 1993, in the Osage County District Court, is beyond the two year period and Plaintiff is therefore barred.

Plaintiff's counters that this action is the same claim(s) as filed two years ago in this court, 92-C-401-E, Walker vs. O'Keefe and the City, which case was dismissed without prejudice by Order of Dismissal entered December 7, 1992; that Plaintiff initial petition was filed within the two year period and the present action was filed within the one year refile provision of 12 O.S. §100, citing Brown v. Hartshorne Public School District No. 1, 926 F.2d 959 (10th Cir. 1991). That case holds that state law time limitations apply to claims under the civil rights laws (§§1981 and 1983) under which Plaintiff now proceeds.

The Court concludes Defendants' propositions (2) and (3) are not well taken and their Motion To Dismiss on these issues should be and the same are hereby DENIED on the ground that Plaintiff has filed the present action within the one-year refile period.

(4) Defendants next argue that Plaintiff is not entitled to relief under the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) because the same is not to be applied retroactively, citing Rivers v. Roadway Express, 114 S. Ct. 1510 (1994), and Landgraf v. USI Film Products, et al, 114 S.Ct. 1483 (1994). The Court agrees.

To the extent Plaintiff's Complaint (Petition) pleads a claim under the Civil Rights Act of 1991, if it does, the Court concludes that such claim should be and the same is herewith DISMISSED.

(5) Lastly Defendant O'Keefe argues that no service has been perfected upon him with more than 120 days having passed after the Complaint (Petition) and Summons were issued.

Rule 4(m), Federal Rules of Civil Procedure provides:

> "If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period."

Plaintiff, in his Response to Defendants' Motion To Dismiss, has made no showing of good cause and, in fact, has failed to take any issue with Defendant O'Keefe's proposition (5). Further, the Court concludes Plaintiff may not continue to gain one-year refile extensions since it appears Oklahoma case law interpreting the "savings statute", 12 O.S. §100, affords one and only one refiling if the case is dismissed after the limitations period has run. Grider v. USX Corp., 847 P.2d 779 (1993). However, the Court concludes such a ruling awaits another court on another day.

As in the earlier filed case, this Court concludes that Plaintiff's Complaint (Petition) as to Defendant Paul O'Keefe should be and the same is hereby DISMISSED without prejudice.

IT IS SO ORDERED this 23rd day of August, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ANGELA FEEME MARIE MORALES, an individual; ANGELA V. MORALES, a minor, MIA N. ROCHA, a minor, and JESSICA M. ROCHA, a minor, by and through their next friend, ANGELA FEEME MARIE MORALES; and KRISTIE R. SMITH, a minor, by and through her next friend SHARON L. TEMPLETON,

Plaintiffs,

v.

CITY OF BARTLESVILLE, a municipal corporation ex rel Bartlesville Police Department; THOMAS R. HOLLAND, JR., City of Bartlesville Chief of Police; and TWO UNKNOWN BARTLESVILLE POLICE OFFICERS, employees of the City of Bartlesville,

Defendants.

FILED

AUG 19 1994

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

Case No. 94-C-73-E

JOURNAL ENTRY OF JUDGMENT

Now on this 26th day of July, 1994, this matter comes on for hearing before the undersigned U.S. Magistrate Judge of the District Court. Plaintiff KRISTIE R. SMITH, a minor, by and through her next friend, SHARON L. TEMPLETON, appears in person and by and through her attorney, Steve Clancy for Charles L. Richardson. Defendants appear by and through their attorney, Jon B. Comstock. Trial by jury is waived by all parties.

The Court, having listened to the testimony of witnesses and being fully advised in the premises, finds that a settlement agreement has been entered into between the parties to settle the

ENTERED ON DOCKET
DATE 8-22-94

claim of KRISTIE R. SMITH for a total of Eight Thousand Three Hundred Thirty Three Dollars and Thirty Three Cents ($8,333.33).

The Court finds that the settlement agreement is reasonable, in the best interests of the minor, and same should be and is hereby approved, and is determined to be binding upon KRISTIE R. SMITH, a minor.

The Court makes no finding regarding the issue of liability or negligence and merely approves the settlement as being in the best interest of the minor child.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff KRISTIE R. SMITH should be and is hereby granted judgment against Defendant City in the total amount of Eight Thousand Three Hundred and Thirty Three Dollars and Thirty Three Cents ($8,333.33).

THE COURT FURTHER ORDERS that the Judgment Amount shall be distributed as follows:

1. Plaintiff's attorney, Charles L. Richardson, shall receive fifty percent of the Judgment Amount as a contingent fee agreed to with Plaintiff, and that such fee is found to be a reasonable attorney fee.

2. One thousand dollars ($1,000.00) shall be immediately disbursed to the Plaintiff.

3. The balance of funds shall be deposited to a Trust Account for the benefit of the minor, Kristie R. Smith.

IT IS SO ORDERED.

S/ Jeffrey S. Wolfe
U. S. MAGISTRATE JUDGE

APPROVED AS TO FORM & CONTENT:

Sharon L. Templeton

SHARON L. TEMPLETON, individually and as next friend of KRISTIE R. SMITH, a minor

CHARLES L. RICHARDSON
Attorney for Plaintiff

JON B. COMSTOCK
Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GULF INSURANCE GROUP,

Plaintiff,

vs.

MURTY NARUMANCHI, and
RADHA NARUMANCHI,

Defendants.

Case No. 94-C-639-B

ORDER

Now before the Court is Plaintiff's Motion to Remand Case to State Court (Docket #5) filed July 22, 1994, and Defendant's Opposition filed August 4, 1994.

Plaintiff, Gulf Insurance Group ("Gulf"), initially commenced this action against Defendants Murty Narumanchi and Radha Narumanchi in Tulsa County District Court on March 14, 1994, Case No. CJ-94-1093. Gulf's Petition alleged Defendants were "indebted to Gulf in the amount of $34,927.98 on account of bond losses resulting from an agreement of indemnity." Defendants were served on March 18, 1994, and return of service was filed on April 20, 1994.

Defendants, proceeding pro se, filed a motion to dismiss which was denied by the state court on April 28, 1994. Defendants subsequently filed a Motion to Reconsider and a Motion to Strike Plaintiff's Discovery Requests. By Order dated June 9, 1994, Defendants' Motion to Reconsider and Motion to Strike were denied. On June 24, 1994, Defendants filed their Notice of Petition For Removal.

Plaintiff asserts Defendants' Notice of Removal was untimely and that it fails to sufficiently state adequate grounds for removal. Defendants' Notice of Removal states:

> 9. Grounds for Removal of the case from State Court to U.S. Dist. Court: **Unwillingness of the State Court to enforce State and Federal laws; and/or deny equal rights and Fifth and Fourth Amendment rights of Petitioners (named defendants).** (emphasis in original; footnote omitted).

Defendants argue the action was properly removed pursuant to 28 U.S.C. §1443[1] and that this Court has original jurisdiction pursuant to 28 U.S.C. §1331. Defendants allege their civil rights are being violated by the state court's failure to "articulate" the basis for its denial of Defendant's motions even after the Defendants requested "a proper 'articulation' of the court's orders." Defendants also contend the state court has denied them their rights by failing "to discipline plaintiff's attorneys for

---

[1] 28 U.S.C. §1443 provides:

> Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;
>
> (2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

harassing named defendants for production of documents."

In order to support removal under §1443, Defendants must claim rights under a law "providing for specific civil rights stated in terms of racial equality." Georgia v. Rachel, 384 U.S. 780, 792 (1966). "Thus ... broad contentions under the ... Due Process Clause of the Fourteenth Amendment cannot support a valid claim for removal under 1443, because the guarantees of those clauses are phrased in terms of general application available to all persons or citizens, rather than in the specific language of racial equality that 1443 demands." Id. The constitutional provisions embodied in the Fourteenth Amendment do not relate to rights embodied in "any law providing for equal civil rights" as required by §1443. Heymann v. State of Louisiana, 269 F.Supp. 36 (D.C.La. 1967).

Defendants' contentions regarding the state court's rulings have nothing to do with racial equality and thus do not support removal under §1443. Varney v. State of Georgia, 446 F.2d 1368, 1369 (5th Cir. 1970). Instead, Defendants assert that they are being denied their constitutional rights by the state court because they are not residents of Oklahoma. It is obvious from the face of the removal petition that the grounds purportedly justifying removal are patently invalid. This is not the proper forum for an appeal of a state court ruling in an alleged breach of contract action. Defendants have failed to set forth any sufficient grounds for removal and thus this action should be and is hereby REMANDED to the District Court for Tulsa County.

IT IS SO ORDERED THIS 18th DAY OF AUGUST, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE